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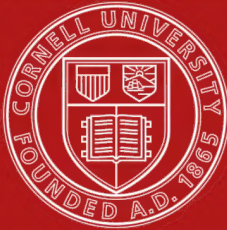
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GREAT AMERICAN LAWYERS



JOHN MARSHALL.

From a bronze statue of William Wetmore Story on the Capitol grounds at Washington.

Great American Lawyers

The Lives and Influence of Judges and
Lawyers Who Have Acquired Permanent
National Reputation, and Have
Developed the Jurisprudence of the
United States.

A HISTORY OF THE LEGAL PROFESSION
IN AMERICA

EDITED BY
WILLIAM DRAPER LEWIS

of the University of Pennsylvania
Dean of the Law Department

VOLUME II

PHILADELPHIA
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1907

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LUTHER MARTIN.

1748-1826.

BY

ASHLEY M. GOULD,

Justice of the Supreme Court of the District of Columbia.

A CENTURY and a quarter ago Edmund Burke, in a speech in Parliament, gave as a reason why it was impossible to subdue the American colonies that in no country in the world was the study of the law so general; that even at that early day as many copies of Blackstone's Commentaries were sold there as in England. He reasoned from these facts that a people thus devoted to the study of the law would know their rights, and "knowing, dare maintain."

How potential this characteristic of the people of Colonial days may have been in securing their independence may admit of debate; certain it is, however, that what has been aptly styled the Critical period of American history developed many men of splendid intellect and boundless industry, who as lawyers, legislators, and judges laid, broad and deep, the foundations of American jurisprudence.

Among these men Luther Martin, of Maryland, occupies a unique place. He was no orator, as were Henry, Wirt, and Pinckney; he was not capable of

the constructive statescraft of Hamilton and Madison; he did not possess the power of clear analysis and the judicial temperament of Marshall; but as a lawyer, and a lawyer alone, he was an acknowledged leader of the American bar for two generations. For thirty years he was the attorney-general of his state; at the age of forty-three he was her most influential representative in the Constitutional Convention of 1787; he was a leading counsel in the two greatest State cases of our earlier history, the impeachment of Samuel Chase and the trial of Aaron Burr, and on the conclusion of the latter he had the honor of being hanged in effigy, in the city of Baltimore, by the side of John Marshall.

The brevity of the fame achieved by one who is only a lawyer, no matter how learned and successful, is aptly illustrated by Martin's career. Beyond the circle of the bar of his own state, his name is now practically unknown, except to historical students of the period of his activity. No monument is erected to commemorate his leadership; his speeches and arguments are buried in the briefs of counsel in the reports of the important cases upon which his learning and ability were lavished; and, excepting a sketch of his career written by Henry P. Goddard, Esquire, and published by the Maryland Historical Society, this eminent lawyer, "the most talked of man in his state for nearly fifty years," is without a biographer. Indeed, were it not for a brief autobiographical sketch which appears in the last of five remarkable

pamphlets published by him in 1801-2 and directed against one Keene, who had married the younger of his two daughters against her father's will, his early life would be unchronicled.

Luther Martin was born at New Brunswick, New Jersey, February 9, 1748, being the third of nine children. He was of English descent; his ancestors being among the first settlers of East Jersey, having come to that section from New England and obtained extensive grants of land along the Raritan river. At the date of Martin's birth these grants had been divided into small farms, one of which his father tilled. His early life was one of poverty and toil. In his thirteenth year he was sent to a grammar school from which, in the following year, he entered Princeton College. He graduated in 1766, at the head of a class of thirty-five. Among his classmates was Oliver Ellsworth, the third chief-justice of the United States.

The equipment with which he entered upon active life is best described in his own words:

From my parents I received a sound mind and a good constitution. They, with unceasing tenderness and zeal, labored to impress me with principles of manly independence, with a spirit of kindness and generosity towards my fellow-creatures, and with reverential love and fear of my God. And as the best security for my performance of my duty in all situations, in which I might be placed in life, they deeply impressed on my young mind the sacred truths of the Christian Religion, the belief of which, though at that time principally owing to education, has since been rivetted by the fullest conviction, grounded on a thorough and

dispassionate enquiry; those sacred truths, which, though too often departed from in my practice, have ever remained too deeply engraven on my heart to be effaced by the hand of infidelity,—and the belief of which is my boast.

These, with a liberal education, were all the patrimony they could bestow upon me; a patrimony, for which my heart bears towards them a more grateful remembrance, than had they bestowed upon me the gold of Peru or the gems of Golconda.

Through the fond partiality of my paternal grandfather, I was the owner of a small tract of land on South-River, not far from New Brunswick; as soon as the laws of my country gave me the power of disposition, I conveyed it to my two elder brothers, as a trifling compensation for the additional toil they had experienced in contributing to the support of a family, the expenses of which had been increased by reason of my education.

Immediately after graduating, Martin started out on horseback, with no other possession than a small amount of pocket money, for the eastern shore of Maryland; there he expected to teach school and support himself whilst he studied law, having adopted that profession against the wishes of his father. He first taught the "Free School," in Queen Anne's County, and thence removed to Somerset County, where he taught for a short period, continuing his law studies, until about the first of September, 1771, when he waited upon John Randolph, the then attorney-general of Virginia, and George Wythe, the chancellor of that state, at Williamsburg, and having passed the examination required by the acts of assembly of Virginia, received a license authorizing him to practice law in the county courts of that commonwealth.

Circumstances, however, changed his plans and impelled him to begin his career as a lawyer in the neighboring state of Maryland. After his admission to the bar in Virginia, he spent the ensuing six months in traveling through that state and western Maryland. During this trip he met and was cordially received by many of the prominent men of the day, including Patrick Henry, John Blair, John Tazewell and Thompson Mason. In Allegheny County, Maryland, he was the guest of Colonel Michael Cresap, the celebrated Indian fighter, to whose memory, through the "Notes" of Jefferson, was attached the massacre of the family of Logan, the Indian Chief. Here he first met the daughter of Cresap, whom he married eleven years later. Upon his return to the eastern shore of Maryland, he found that three of the most prominent lawyers of Somerset and Worcester counties, Maryland, had died during his absence. These deaths opened a field for practice which Martin quickly occupied. He took up his residence in Somerset and practiced in that and Worcester County, Maryland, and in the two adjacent counties of Accomac and Northampton, in Virginia. His success was immediate and pronounced. At the time of the interruption of business by the beginning of the Revolution, he was in receipt of an income of a thousand pounds a year. He relates that, at one term of the criminal court at Williamsburg, Va., he was counsel for thirty defendants, of whom twenty-nine were acquitted,

and the thirtieth, charged with murder, was convicted of manslaughter.

In the autumn of the year 1774, while he was attending the courts in Virginia, those of the inhabitants of Somerset County who opposed the claims of Great Britain elected Martin one of the committee of safety for the county, and also a representative to the convention which was held at Annapolis in the month of December of that year. Of his action during this critical period he says:

My firm and decided support of the opposition to the unwarrantable claims of Great Britain, which caused our revolution, is well known, — and that at a time when, and in a place where, it indeed “tried men’s souls,” — for there was a period of considerable duration, throughout which, not only myself, but many others, acting in the same manner, did not lay down one night in their beds, without the hazard of waking on board a British armed-ship, or in the other world.

In 1777, when Howe arrived at the head of the Chesapeake Bay and landed at Elkton his first step was to issue a proclamation of amnesty to the inhabitants of that portion of Maryland; but he gained few recruits, largely on account of a counter-proclamation drawn up by Luther Martin.

On February 11, 1778, through the influence of Samuel Chase, of Somerset County, who was a member of Congress and afterwards an associate-justice of the Supreme Court of the United States, Martin was appointed attorney-general of Maryland. He qualified on the twentieth of the following May and

almost immediately removed to the city of Baltimore, where he resided until his final retirement from practice forty-four years afterward. At the time of his appointment he was thirty years of age. The office at that period required great ability and inflexible courage, and he possessed both. His fearless and rigorous enforcement of the laws against the sympathizers of the British is illustrated by the case of *State vs. Samuel Johnston*.¹ Johnston applied to be admitted to practice in the courts of Maryland. Martin opposed his admission on the ground that at the outbreak of the Revolution Johnston had resigned certain petty offices in Pennsylvania rather than take the oath of allegiance, and had removed to Maryland to remain "peaceable and inactive" during the war. Johnston acknowledged this charge, but pleaded that his conscience did not permit his taking the oath referred to at the time, as he did not think himself absolved from allegiance to the King, until independence was acknowledged, although he wished well to our liberties; that his sons-in-law were colonels in the American militia; that two sons were privates in the Continental army, one of whom was taken prisoner; and that now that independence was established he was attached to the government of Maryland. Although all the witnesses corroborated Mr. Johnston and represented him as a mild, conscientious gentleman, Martin contested his admission by every legal resort and it was

¹ 2 Harris & McHenry's Reports, 160 (1786).

only upon a third hearing that Johnston was successful.

On the twenty-sixth of May, 1787, the legislature of Maryland, by joint ballot, selected five delegates to the convention which "held its meetings in that plain brick building in Philadelphia already immortalized as the place from which the Declaration of Independence was published to the world," and which was to give to the nation what Gladstone describes as the most wonderful work ever struck off by the brain and purpose of man. The delegates chosen were James McHenry, a physician, and for a period of years Washington's secretary; Daniel, of St. Thomas Jennifer; Daniel Carroll, a planter, whose estate forms a large portion of the present city of Washington; John Francis Mercer, who studied law with Jefferson, was subsequently governor of Maryland, and always Jefferson's personal and political friend; and Luther Martin.

Although mentioned last, Martin was the ablest and most aggressive of the state's delegates and the only one who took an active part in the debates. To estimate, at their true value, his services in this memorable assembly, it is necessary to bear in mind what an eminent historian has defined as an ideally perfect assembly of law-makers, viz: two or three men of original constructive genius; two or three leading spirits, eminent for shrewdness and tact; a dozen or so excellent critics, representing various conflicting interests; and a rank and file of respecta-

ble, commonplace men, competent to proclaim its results and secure their adoption. In the Constitutional Convention, Martin belonged preëminently to the class of excellent critics, and from the ninth day of June, when he presented his credentials, up to the day when he went back to Maryland, vowing he would have nothing more to do with such high-handed proceedings, his position was one of able and aggressive opposition to any scheme which had for its object the establishment of a highly centralized and puissant national government. He was the representative of one of the smaller states, and with quick precision saw the baleful results to those states which would follow the adoption of what history knows as the Virginia plan, introduced by Edmund Randolph, the governor of that state. It will hardly be contended, at this time, by the most ardent advocate of a centralized and powerful national government that the Virginia plan, with its practical elimination of the smaller states from the exercise of federal power, its provision for the setting aside by the national legislature of such state laws as it might deem unconstitutional, and its executive to be chosen by the same national legislature, would have stood the test of time; indeed, that it would have endured longer than that "rope of sand," the Confederation. And yet one who studies even the brief and practically surreptitious journals of that Convention must conclude that the present Constitution would never have been evolved from its labors, had it not been for

the leadership of Luther Martin, aided by Yates and Lansing, of New York, in opposition to the scheme of Edmund Randolph backed, as it was, by the Father of the Country himself.

The manner in which this question, most vital to the formation of the Constitution, was finally settled by means of the famous Connecticut compromise, whereby the national principle was to prevail in the House of Representatives and the federal principle in the Senate, is well known. Martin was a member of the Committee, sometimes known as the Grand Committee, which was to harmonize the apparently irreconcilable differences between the larger and the smaller states as to representation and whose report on the subject is embodied in the Constitution. His language in regard to its work is interesting:²

However, the majority of the select committee at length agreed to a series of propositions by way of compromise, part of which related to the representation in the first branch nearly as the system is now published; and part of them to the second branch, securing in that equal representation, and reported them as a compromise upon the express terms, *that they were wholly to be adopted or wholly to be rejected*; upon this compromise, a great number of the members so far engaged themselves, that if the system was progressed upon agreeable to the terms of compromise, they would lend it their names, by signing it, and would

² "The Genuine Information," delivered to the Legislature of the State of Maryland relative to the proceedings of the General Convention held at Philadelphia, in 1787, by Luther Martin, Esquire, attorney general of Maryland and one of the delegates of the State Convention, Washington (1836).

not actively oppose it, if their states should appear inclined to adopt it. Some, however, in which number was myself, who joined in the report, and agreed to proceed upon those principles, and see what kind of a system would ultimately be formed upon it, yet reserved to themselves in the most explicit manner, the right of finally giving a solemn dissent to the system, if it was thought by them inconsistent with the freedom and happiness of their Country. This will account why the members of the convention so generally signed their names to the system; not because they thoroughly approved it, or were unanimous for it; but because they thought it better than the system attempted to be forced upon them. This report of the select committee was, after long discussion, adopted by a majority of the convention, and the system was proceeded in accordingly; I believe near a fortnight, perhaps more, was spent in the discussion of this business, during which we were on the verge of dissolution, scarce held together by the strength of a hair, though the public papers were announcing our extreme unanimity.

I think it my duty to observe, that during this struggle to prevent the *large states* from having *all power* in their hands, which had nearly terminated in a dissolution of the convention, it did not appear to me that either of those illustrious characters, the honorable Mr. Washington, or the president of the state of Pennsylvania (Benjamin Franklin) were disposed to favor the claims of the *smaller states* against the *undue superiority* attempted by the large states; on the contrary, the honorable president of Pennsylvania, was a *member* of the *committee of compromise*, and there *advocated* the *right* of the *large states* to an *inequality* in *both branches*, and only *ultimately conceded* it in the *second branch* on the *principle of conciliation*, when it was found no other terms would be accepted. This I think it my duty to mention, for the *consideration of those* who endeavor to *prop up a dangerous and defective system* by great names; soon after this period, the honorable Mr. Yates (afterwards chief-justice of the state of New York) and Mr. Lansing (who succeeded the latter as chief jus-

tice) left us; they had uniformly opposed the system, and I believe, despairing of getting a proper one, they returned no more.

The position into which Martin was forced by the attempt of the larger states to form a national government which they could practically control, undoubtedly had a powerful influence upon his subsequent action in the Convention. That he was a true patriot and loyal American is evident from his previous record. It is equally true that he opposed in the Convention each step taken to clothe the general government with absolute powers in any particular. This resulted in a more cautious and careful consideration of the various sections and undoubtedly strengthened the instrument in no inconsiderable degree.

On many of the subjects which were debated by the Convention, Martin took advanced ground, and his position has been amply vindicated by subsequent events. An illustration is found in his opposition to the second of the great compromises between northern and southern interests, which related to the abolition of the foreign slave-trade and the power of the federal government over commerce. The New England states consented to the prolonging of the foreign slave-trade for twenty years, or until 1808; and in return South Carolina and Georgia consented to the clause empowering Congress by a simple majority of votes to pass navigation acts and otherwise regulate commerce. In the debate which preceded the adoption of this compromise, Martin's argument

against slavery would have done credit to George William Curtis or Wendell Phillips. He said:

We have just assumed a place among independent nations in consequence of our opposition to the attempts of Great Britain to *enslave us*; this opposition was grounded upon the *preservation of those rights*, to which God and nature had entitled us, not in particular, but in common with all the rest of mankind. We have appealed to the Supreme Being for his assistance, as the God of *freedom*, who could not but approve our efforts to preserve the rights which he has thus imparted to his creatures; now, when we scarcely have risen from our knees, from supplicating his aid and protection, in *forming our government* over a free people, a government formed pretendedly on the principles of *liberty* and for its preservation, — in that government to have a provision not only putting it out of its power to restrain and prevent *slave trade, even encouraging that most infamous traffic*, by giving the states power and influence in the union, in proportion as they cruelly and wantonly sport with the *rights of their fellow creatures*, ought to be considered as a solemn mockery of, and insult to that God whose protection we then implored, and cannot fail to hold us up in detestation, and render us contemptible to every true friend of liberty in the world.

Strong sentiments from the representative of a slave-holding state in the year 1787!

Martin left the Convention without signing the Constitution and upon his return to Maryland continued his opposition to its ratification. His argument before the legislature of that state, called "The Genuine Information," is probably the ablest presentation of the cause of the Anti-federalists. It anticipated the arguments which a later generation heard expounded, with inexorable logic, in the

speeches of John C. Calhoun. But in spite of his powerful resistance, and the aid of his staunch friend, Samuel Chase, after a session of five days, the Constitution was ratified by a vote of sixty-three to eleven.

The connection of the names of Martin and Samuel Chase in opposition to the ratification of the Constitution brings vividly to the mind the former's next public appearance in a matter of national importance. On February 4, 1805, the trial of the impeachment of Samuel Chase, an associate-justice of the Supreme Court of the United States, began before the Senate at Washington. Less than fourteen years before the respondent had been the leader of the Anti-federalist forces of his state; he was to be tried on charges which were the outgrowth of his intense federalism. His leading counsel was the man who had fought shoulder to shoulder with him in the battle against the Constitution, himself now wearing from Jefferson the title—"The federal bulldog." The circumstances leading up to the impeachment and trial of the only justice of our highest judicial tribunal who has been subjected to this ordeal, are interesting, and must be understood to appreciate the significance of the event. The question to be settled went beyond the mere individual interests involved; the independence of the federal judiciary was at stake. Barely ten years had passed since the impeachment of Warren Hastings before the House of Lords; and men's minds were still

full of the judgment rendered in that important case. In contrasting the two events, a modern historian says:

The impeachment of Judge Chase was a cold and colorless performance beside the melodramatic splendor of Hastings' trial; but in the infinite possibilities of American democracy, the questions to be decided in the Senate chamber had a weight for future ages beyond any that were then settled in the House of Lords.

A sequence of events clearly establishes the fact that President Jefferson was dissatisfied with the jurisdiction over the executive and legislative departments assumed by the federal judiciary. On February 24, 1803, Chief-Justice Marshall had delivered the unanimous opinion of the Supreme Court in the case of *Marbury vs. Madison*, in which the court refused to apply an act of Congress conferring on them the power to issue a mandamus to the Secretary of State because the Court thought the act was unconstitutional. After deciding that the Court had no jurisdiction over the matter in issue, Marshall had proceeded to instruct the administration as to the President's duty to issue a commission to the plaintiff. This opinion Mr. Jefferson declared to be "an obiter dissertation of the Chief-Justice and a perversion of the law."³ John Pickering, United States district judge for New Hampshire, had in the same year been impeached and, after a trial before the Senate which was arbitrary, illegal, and infa-

³ Jefferson's Works, vol. VII, 290.

mous, had been found guilty and removed from the bench. The position assumed by the administration as to the federal judiciary may be gathered from the remarks of the loquacious senator, William B. Giles, of Virginia, an administration leader, which are reported by John Quincy Adams, in his memoirs.⁴

In the course of this conversation Giles "treated with the utmost contempt the idea of an *independent* judiciary, said there was not a word about such an independence in the Constitution, and that their pretensions to it were nothing more nor less than an attempt to establish an aristocratic despotism in themselves. The power of impeachment was given without limitation to the House of Representatives; the power of trying impeachments was given equally without limitation to the Senate; and if the judges of the Supreme Court should dare, as they had done, to declare an act of Congress unconstitutional, or to send a mandamus to the Secretary of State, as they had done, it was the undoubted right of the House to impeach them, and of the Senate to remove them, for giving such opinions, however honest or sincere they may have been in entertaining them. . . . A removal by impeachment was nothing more than a declaration by Congress to the effect: You hold dangerous opinions, and if you are suffered to carry them into effect you will work the destruction of the nation. *We want your offices* for the purpose of giving them to men who will fill them better."

⁴Vol. I, 322, *et seq.*

It must be conceded that Samuel Chase was a shining mark for the assaults of the republicans. He had been raised in a strenuous school of politics. At an early age he had distinguished himself while a member of the colonial legislature of Maryland, by his opposition to the royal governor; he had vehemently resisted the Stamp Act, being a leader of the assemblage of "Sons of Liberty," at Annapolis, that forcibly opened the public offices, destroyed the stamps and burned the collector in effigy. He was a signer of the Declaration of Independence, and when, in 1796, appointed to the Supreme bench by Washington, he certainly failed to cast aside the ardent federalist convictions which he had acquired or to repress them on all occasions. He was a stern and overbearing man, and, after his appointment to the Supreme bench, had openly sympathized with and supported John Adams. On the other hand there is no question but that he was a man of great ability, of absolute integrity, and a fearless patriot. That his impeachment was sought personally by Jefferson would seem to be well established by the following letter written by the latter to Joseph Nicholson, a member of Congress from Maryland, who had managed the impeachment of Judge Pickering:

You must have heard of the extraordinary charge of Chase to the Grand Jury at Baltimore. Ought this seditious and official attack on the principles of our Constitution and on the proceedings of a state to go unpunished? And to whom so pointedly as yourself will the public look for the necessary measures? I ask these

questions for your consideration. As for myself, it is better that I should not interfere.

In order to secure the impeachment, the most able administration men in the House were appointed managers, with John Randolph, of Roanoke, at their head. The immediate grievance was the charge made by Judge Chase to a federal grand jury in Baltimore, in which he severely arraigned Jefferson's administration; but to obtain more plausible grounds, the managers were compelled to go back five years to the trials of Fries and Callender for sedition.

Probably no lawyer ever entered a case with greater delight and zest than did Martin in undertaking the defense of Samuel Chase. The latter was a native of Somerset County, where Martin formerly lived and where he first displayed the legal ability which placed him at the head of the bar of his state. When, at the age of thirty, Martin received the appointment of attorney-general of Maryland, it came through the influence of Samuel Chase. Ten years later, when Chase became chief-justice of the newly established criminal court of Baltimore, Martin, as attorney-general, prosecuted five thousand cases before him. Their friendship had been long and unbroken. Moreover, while the case against the justice was, from a legal standpoint, decidedly weak, it was essentially a political trial and was to be tried before a tribunal in which twenty-five out of thirty-four senators belonged to the party whose

principles and practices Chase had criticised from the bench; a situation which surely inspired the "joy of battle" in the breast of so aggressive an advocate as Martin. Added to all this, it was almost a personal contest with Thomas Jefferson, and the feeling which Martin entertained towards Jefferson was equalled only by that which Jefferson entertained towards Martin. The severest condemnation Martin, whose range of expletives was not narrow, could bestow upon any man was to call him "as great a scoundrel as Tom Jefferson;" while during the subsequent Burr trial, Jefferson wrote to George Hay, the district attorney, about Martin, as follows:

Shall we move to commit Luther Martin as a *particeps criminis* with Burr? Grayball will fix upon him misprision of treason at least, and at any rate his evidence will put down this unprincipled and impudent bull-dog, and add another proof that the most clamorous defenders of Burr are all his accomplices. It will explain why Luther Martin flew so hastily to the aid of "his honorable friend," abandoning his clients and their property during a session of a principal court of Maryland, now filled, I am told, with the clamors and ruins of his clients.

The trial was presided over by Aaron Burr, then Vice-President, and to his love for the spectacular was probably due the arrangement of the Senate chamber. On the right and on the left of his chair were two rows of benches covered with crimson cloth. On these the Senators were to sit in judgment. Before them was a temporary semicircular gallery, raised on pillars and covered, front and

seats, with green cloth. To this the women came in crowds. Under the gallery were three rows of benches rising one above the other, likewise covered with green cloth, and set apart for the heads of departments, foreign ministers, and the members of the House of Representatives. In front of this amphitheatre, and facing the right and left of the Vice-President were two boxes covered with blue cloth. One was occupied by the managers, the other by the accused and his counsel. Among the Senators sitting in judgment on the case was the future President, John Quincy Adams, who steadily voted in favor of the accused, and many other wearers of historic names, such as Bayard, of Delaware; Breckenridge, of Kentucky; Dayton, of New Jersey; Giles, of Virginia; Tracy, of Connecticut; Pickering, of Massachusetts; and Sumpter, of South Carolina.

The chief manager of the impeachment on the part of the House was John Randolph, of Roanoke, then but thirty-one years of age, and already the leader of that body, yet more feared than loved by reason of his sarcastic eloquence. Hildreth aptly comments on his speeches in this case, as "tingling but desultory surface strokes." Of his associates Cæsar Rodney, of Delaware, was the most notable.

At the head of the counsel for the accused was Luther Martin, described by Professor Adams, in his life of John Randolph, as "most formidable of American advocates, the rollicking, witty, audacious

Attorney-General of Maryland; boon companion of Chase and the whole bar; drunken, generous, slovenly, grand: bull-dog of Federalism as Mr. Jefferson called him; shouting with school-boy's fun at the idea of tearing Randolph's indictment to pieces and teaching the Virginian democrats some law." Associated with him in the defence were Robert Goodloe Harper, who had been the Federal leader of the House during Adams's administration, and who was later a senator from Maryland; Joseph Hopkinson, Philip Barton Key, and Charles Lee, who had been Washington's attorney-general.

Martin's speech occupied parts of two days and was the best of his career; at all events, the best that has been preserved. Professor Adams says in regard to it:

If any student of American history, curious to test the relative value of reputations, will read Randolph's opening address, and then pass on to the argument of Luther Martin, he will feel the distance between show and strength, between intellectual brightness and intellectual power. Nothing can be finer in its way than Martin's famous speech. Its rugged and sustained force; its strong humor, audacity, and dexterity; its even flow and simple choice of language, free from rhetoric and affectations; its close and compulsive grip of the law; its good-natured contempt for the obstacles put in its way, — all these signs of elemental vigor were like the forces of nature, simple, direct, fresh as winds and ocean.

In one part of his argument Martin throws an important sidelight upon his conception of the old question in legal ethics as to the duty which a lawyer owes to his client. He holds that when coun-

sel have done all that can be done to insure a fair trial for a client, if, according to the clear, undoubted evidence, the latter is guilty, it is the duty of counsel to submit his client's case to the decision of the jury without any attempt to mislead them, and this whether counsel is appointed by the court or retained by the criminal. He adds: "the duty of a lawyer is, most certainly, in every case to exert himself in procuring justice to be done to his client, but not to support him in injustice."

In his history of the United States, Adams speaks of this speech of Martin's as the climax of his career. Justice Chase always remembered his services with gratitude. In the first volume of the *American Law Review*, published in 1866, it is related that some time after the acquittal of Chase, on the trial of a cause in the Federal court at Baltimore, Martin, being overcome by an excess of drinking, was so insolent and overbearing in his deportment towards the court, that it became unendurable; and the district judge drew up a commitment for contempt, and handed it to Chase for his signature. Chase, after taking his pen, threw it down again, saying: "Whatever may be my duties as Judge, Samuel Chase can never sign a commitment against Luther Martin."

On the 22d of May, 1807, a little more than two years after the acquittal of Justice Chase, the most memorable, the most dramatic legal contest in the history of our country, was begun at Richmond,

Virginia. Aaron Burr, lately the vice-president of the United States, who, while a fugitive from the justice of two states for the killing of Alexander Hamilton, had presided over the trial of the impeachment of Chase "with the dignity and impartiality of an angel but with the rigor of a devil," was before the United States Circuit Court for the District of Virginia to be tried for high treason, in levying war against the United States, and for a misdemeanor, in preparing a military expedition against Mexico, then a territory of the king of Spain, with whom the United States was at peace. Even from the viewpoint of a century afterwards, it is not difficult to understand the national excitement and terror caused by Burr's plans and actions as interpreted and probably magnified by his political opponents. He himself was a man of mystery, one to be feared and dreaded, a master in deception and intrigue, brave to recklessness, of indomitable energy. He was practically an outcast from the east, broken in fortune and ripe for any desperate undertaking. His movements in the west, upon which the indictments were based, were clouded with sinister mystery, and, to a nation hardly yet feeling the strength of the constitutional ties which bound its parts together, fraught with danger of national dissolution and dismemberment. On November 27, 1806, the President had issued his proclamation denouncing the schemes of Burr. This traveled the country from end to end, filling the minds of the

people with consternation and creating in them the belief that the conspiracy extended from one end of the Union to the other.

No greater tribute to Luther Martin's ability as a lawyer can be found than that Burr, who had met him for the first time at the trial of Justice Chase, selected him as his counsel in this memorable contest. For Burr himself was an able and astute lawyer, and a keen judge of men; and the wisdom of his selection of Martin is evident to the student of the proceedings which occupied the Court for five successive months. From Martin's standpoint there were many points of similarity between the two trials. In each important questions of law were involved which were unsettled in this country and which required of counsel a clear and adequate knowledge of common law precedents; in this domain, Martin was unexcelled by any lawyer of his time. Again, in the trial of Justice Chase, an overwhelming majority of senators was opposed to him in political faith; in the Burr trial, the defendant was compelled to accept jurors who openly avowed their belief in his guilt, so wide-spread was the feeling against him. But, above all, here, as in the Chase case, Martin was opposing his arch-enemy, Thomas Jefferson, whose active interest in the trial of Burr was manifested by word and deed throughout the entire case.

The scene at the opening of the trial is memorable. It was presided over by John Marshall,

chief-justice of the Supreme Court of the United States; beside him sat Cyrus Griffin, judge of the United States District Court of Virginia. The Chief-Justice was then in his fifty-second year and described by Parton as a tall, slender man, with a majestic head, without one gray hair, with eyes the finest ever seen, except Burr's, large, black, and brilliant beyond description. It was often remarked during the trial, that two such pairs of eyes had never looked into one another before.

The counsel engaged were worthy of the case. On the side of the Government were George Hay, the prosecuting attorney, an earnest and zealous man, and a close friend of Jefferson; William Wirt, then only thirty-five years of age, just rising into eminence, and said to have been specially retained by Jefferson, whose speech "Burr and Blennerhassett," delivered in the course of the trial, has made his name familiar to every American school boy; and Alexander McRae, lieutenant-governor of Virginia. The accused was surrounded by the foremost lawyers of the time: Edmund Randolph, attorney-general and secretary of state in the cabinet of Washington; John Wickham, leader of the Richmond bar; Benjamin Botts and "Jack" Baker, also of Virginia; Charles Lee, who had been attorney-general of Maryland and regarded as an excellent lawyer; and Luther Martin, "who," according to the most recent historical writer on the subject of The Aaron Burr Conspiracy, "in legal learning, towered head

and shoulders above those around him, the first lawyer of his time."

A study of the proceedings of this long and at times tedious trial reveals the vast fund of knowledge of the common law relating to treason and conspiracy possessed by Martin; his readiness of citation of cases, the result of a memory which was remarkable; and the vehemence with which he contested every point. An instance of the latter occurred when the defendant moved for a subpoena *duces tecum* to be directed to President Jefferson, who had in his possession, it was alleged, certain letters deemed material to the defense. This motion was strongly resisted by the government. In the course of the argument, Martin used the following language:

All that we want is the copies of some papers and the original of another. This is a peculiar case, sir. The President has undertaken to prejudge my client by declaring that "of his guilt there can be no doubt." He has assumed the knowledge of the Supreme Being himself, and pretended to search the heart of my highly respected friend. He has proclaimed him a traitor in the face of that country which has rewarded him. He has let slip the dogs of war, the hell-hounds of persecution, to hunt down my friend. And would this President of the United States, who has raised all this absurd clamor, pretend to keep back the papers which are wanted for this trial, where life itself is at stake? It is a sacred principle, that in all such cases, the accused has the right to all the evidence which is necessary for his defense.

On June 13, the Chief-Justice, in a fearless and unanswerable opinion, following several days of

heated argument, held that the Chief Executive had no prerogatives which absolved him from the obligations of citizenship and decided that the subpoena might issue. Jefferson, lashed into rage by Martin's criticism and Marshall's decision, wrote to his prosecutor, Hay:

The leading feature of our Constitution is the independence of the Legislative, Executive, and Judiciary of each other; and none are more jealous of this than the Judiciary. But would the Executive be independent of the Judiciary if he were subject to the *commands* of the latter, and to imprisonment for disobedience; if the smaller courts could bandy him from pillar to post, keep him constantly trudging from north to south and east to west, and withdraw him entirely from his duties?

The vital point at issue in the case, however, was the interpretation of the clauses of the Constitution which declare that "Treason against the United States shall consist only in levying war against them;" and "That no person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court." There was no evidence that Burr was present either actually or constructively on Blennerhassett's island when the alleged "act of levying war" was committed. The battle over the law and facts involved raged through a period of ten days; of this, Martin occupied fourteen hours in a speech of such ardor and ability that all who heard it unite in the opinion that nothing was left unsaid which was essential to the defense of his client. Read at this day, it leaves

the impression of redundancy, of time wasted on points of law as to which no court would now hear argument; of unnecessary digression into fields political. But the questions of law involved were then of first impression in this country; it was essential to demonstrate that the common law doctrine of treason had no place under our Constitution; the style of forensic oratory was more verbose and florid than that of today, and the active participation of the Administration in the prosecution was a constant invitation to counsel to go outside the record. It was followed by Marshall's opinion, the longest in his career; and it was virtually an instruction to the jury to acquit Aaron Burr of the crime of treason. While this opinion did not escape contemporary criticism, it stands, and will ever stand, as sound logic and sound law. No lawyer can read its closing paragraphs without a thrill of pride in his profession and in the great Chief-Justice, its foremost exemplar. The District Attorney had, during his argument, assumed a somewhat threatening attitude towards the court, insinuating that Justice Chase had been impeached for an opinion substantially similar to that sought by Burr's counsel. Moreover, Marshall well knew the attitude of Jefferson towards the judiciary. At different times, during the argument, counsel had adverted to political considerations which might sway the mind of a judge in deciding a case like that then before the court. The quiet dignity, the invincible firmness of the Chief-Justice's

treatment of this phase of the case is worth excerpting from this celebrated opinion:

Much has been said in the course of the argument on points on which the court feels no inclination to comment particularly, but which may perhaps not improperly receive some notice.

That this court dares not usurp power is most true. That this court dares not shrink from its duty is not less true. No man is desirous of becoming the peculiar subject of calumny. No man, might he let the bitter cup pass from him without self-reproach, would drain it to the bottom. But if he have no choice in the case, if there be no alternative presented to him but a dereliction of duty or the opprobrium of those who are denominated the world, he merits the contempt as well as the indignation of his country, who can hesitate which to embrace.

The remaining charge against Burr, that of misdemeanor in preparing an expedition against the territory of a foreign prince or state, was speedily disposed of by a verdict of not guilty; no proof of any act by Burr in connection therewith within the district of Virginia having been proved by the prosecution.

Thus ended the celebrated Burr trial. But the relations between the notorious defendant and his leading counsel, which were its outgrowth, seem to have continued until the death of the latter. After the acquittal, Burr went to Baltimore, where he was entertained in princely style by Martin. The popular odium which attached to Burr, however, followed him to that city, and involved likewise his faithful counsel and the Chief-Justice who presided at the trial. While Burr was dining at Martin's

house with a large company, they were serenaded with "The Rogues' March." Hand-bills were posted throughout the city stating that effigies of Chief-Justice M——, his Quid Majesty, B——, the chemist, and Lawyer Brandy-Bottle, would be *marshalled* for execution by the hangman at Gallows Hill, at 3 o'clock P. M., "in consequence of the sentence pronounced against them by the unanimous voice of every honest man in the community." Great fears were entertained of a riot, and Martin's house was protected by the police; but the mob committed little violence; and, proceeding to the appointed place, spent the force of its indignation by hanging the effigies of Burr, Blennerhassett, the Chief-Justice, and Martin. As further showing the popular feeling, it is related that among the toasts at a Fourth of July celebration in Maryland was the following:

Luther Martin, the ex-Attorney-General of Maryland, the mutual and highly respected friend of a convicted traitor. May his exertions to preserve the Cataline of America procure him an honorable coat of tar, and a plumage of feathers, that will rival in finery all the mummeries of Egypt.

Martin's reply to this bucolic outburst is worth reproducing as an illustration of his powers of invective. To fully appreciate it, the fact should be remembered that Maryland, a few years before, had given her solid vote in the presidential contest for Aaron Burr!

Who is this gentleman whose guilt you pronounce and for whose blood your parched throats so thirst? Was he not a few years past adored by you next to your God? I mean your earthly God (Jefferson), for whether you believe in a Deity, who has any government over your Republic of dust and ashes, I know not. Were you not, then his warmest admirers? Did he not, then, possess every virtue? Had he then one sin — even a single weakness of human nature? He was, then, in power. He had then, influence. You would, then, have been proud of his notice. One smile from him would, then, have brightened up all your faces; one frown from him would have lengthened all your visages.

Go, ye holiday, ye sunshine friends, ye time-servers, ye criers of hosannahs today and crucifiers tomorrow. Go, hide your heads, if possible, from the contempt and detestation of every virtuous, every honorable inhabitant of every clime.

Martin's participation in the defense of Burr does not seem to have permanently affected his popularity as a lawyer. In 1805 he had resigned the attorney-generalship of his state, after twenty-seven years of consecutive service. In spite of his years (for at the close of the Burr trial he was over sixty years of age), he had the largest practice of any lawyer in the state. He continued to be employed in cases of importance until 1814, when he was appointed chief judge of the Court of Oyer and Terminer for Baltimore City and County. He presided over this court with honor to himself and satisfaction to the people until its abolition in 1816. In February, 1818, forty years from the date of his first commission, he was again appointed attorney-general of Maryland. He was then seventy years of age. His health had become infirm and most of the work of

the office was performed by an assistant. He held the position until he was stricken with paralysis in 1820.

Martin was admitted as a counselor to the bar of the Supreme Court of the United States on February 8, 1791, on motion of the attorney-general, Edmund Randolph, of Virginia, and was the thirty-third lawyer to sign the roll. The Court was then sitting in Philadelphia. He appeared as counsel in the first case to be found on the dockets of that court, that of Nicholas and Jacob Vanstophorst vs. The State of Maryland. This case was never argued, the record showing it to have been "discontinued by consent, Aug. 6, 1792." The dockets and reports of that court for a quarter of a century show his appearance at practically every term in every variety of litigation which could be brought there for hearing. At one term he appeared on one side or the other in a fifth of the cases argued and decided.

The last important litigation in which Martin participated in the Supreme Court of the United States was the celebrated case of *McCulloch vs. Maryland*,⁵ which involved the question of the power of Congress to incorporate a national bank, and, incidentally, the right of a state to tax any of the constitutional means employed by the general government to execute its powers. It was decided in a luminous opinion by Marshall at the February Term, 1819. Martin appeared for the state, in as-

⁵ 4 Wheaton's Reports, 316.

sociation with Messrs. Hopkinson and Walter Jones, while Webster, Wirt, and Pinckney were counsel for the Bank. In his argument, Martin abandons his stiff federalism and goes back to the theory of the rights of the individual states for which he had contended before the Constitutional Convention and the legislature of Maryland in 1787. But he failed to convince the members of the Supreme Court of the United States as he had failed before the Convention and the Legislature.

The private life of Luther Martin is in painful contrast to the brilliancy and success of his public and professional career. In 1783 he married the daughter of the celebrated Captain Michael Cresap, who, as stated, was charged by Jefferson in his "Notes on Virginia" with the massacre of the family of the Indian Chief Logan. His wife, who is described as a woman of great beauty, died while he was in the prime of life, leaving two daughters, who inherited her beauty. The youngest daughter, Elinor, when but sixteen years old, eloped with one Richard Raynal Keene, who had studied law in her father's office. Martin's violent opposition to this marriage is manifested in the series of five pamphlets, heretofore referred to, entitled "Modern Gratitude," in which he excoriates Keene with all the virulence which his extensive vocabulary and wide reading of criminal cases had placed at his command. This inauspicious marriage resulted unhappily, and the young wife died in 1807 leaving a son, who died un-

married. The elder daughter also married unhappily and died insane.

In the year 1800, while his daughters were in their teens, Martin, now fifty-two years of age, paid his addresses to a charming and wealthy widow, Mrs. Mary Hager, a lady who at fifteen years of age had refused General Horatio Gates, of revolutionary fame, and who was at this time the widow of Charles Hager, mother of one daughter, and possessed of a large estate in western Maryland. The mother had occasion to employ Martin to transact some law business and was shrewd enough not to refuse him till he had won her suits. A series of his letters to this lady are extant. All of them are readable, most of them are very ardent love letters and very interesting from their mixture of love and politics as well as from their revelation of the writer's character. In the first of the series, dated Annapolis, May 12, 1800, he offers himself as follows:

You have a charming little daughter who wants a father. I have two who stand in need of a mother. By doing me the honor to accept my hand, our dear children may have the one and the other, and I promise you most sacredly that in me you shall ever find a tender, indulgent and affectionate husband, and your present little daughter shall find in me everything she could wish in a father. My fortune, my dear madam, is not inconsiderable. I have a large landed estate in Maryland and Virginia and my practice brings me more than \$12,000 per year. Our estate united will enable us to live in a style of happiness and elegance equal to our wishes, and so far am I, my dear madam, from wishing my little girls to be benefited by your estate, that if we should not increase our family, your fortune, whatever it may be, shall be

your own, if you survive me; or if you should not survive me, your daughter's.

The third letter of the series tells its own story and is pretty conclusive evidence that at this period of his career Martin had lost the power of self-control in the use of stimulants. Reproaching the lady for coldness, he says:

I have been told since you left town that on last Sunday week, in the evening, I was seen at your lodgings. Of this I had no possible recollection. I doubt not that I made a very foolish figure, but I think it impossible that I should have behaved with rudeness or impropriety. Was that the reason, my very dear Mrs. H., of the coldness and reserve you appeared to meet me with on the Monday morning when I called on you before I went to Annapolis? If so, I will not blame you, but be assured you shall never see me again in a situation that I know not what I do, unless it should proceed from the intoxication of love. In the heat of summer my health requires that I should drink in abundance to supply the amazing waste from perspiration, but, having found that I was so unexpectedly affected as I was by cool water and brandy I have determined to mix my water with less dangerous liquors. Nay, I am not only confining myself to mead, cider, beer and hock, mixed with soda water, but I am accustoming myself to drink water alone. Thus if we live to see each other again you will find me most completely reformed and the soberest of the sober.

In a letter of December 17, 1800, he is very loving and pleads for a favorable ending of his suit, announces that he has sent the lady a Christmas box of currants and raisins with a jug of Madeira for mince pie, and (forgetting his promised reforma-

tion) promises to drink her health in a glass of good Madeira at 2:30 p. m. on Christmas day and wishes her to observe the same hour by a similar libation.

In the last letter, June 12, 1801, the advocate virtually abandons his suit as hopeless and falls back into the position of legal adviser and personal friend.

As clearly indicated in these letters, Martin's weakness was his tendency to excessive indulgence in intoxicating liquors. It is true, and should be kept in mind, that he lived at a time when this vice in a public man did not weigh against him as it does at the present day. And in according Martin his proper place among his contemporaries, this frailty, rather than condemning him, excites wonder that, handicapped as he was by it, he was able, for half a century to maintain his high place among the lawyers of his day. For the records are abundant that he was a prodigious drinker. In the diary which Blennerhassett kept during the Burr trial is the following entry:

As we were chatting, after dinner, in staggered the whole rear-guard of Burr's forensic army — I mean, the celebrated Luther Martin, who yesterday concluded his fourteen hours' speech. His visit was to Major Smith, but he took me by the hand, saying there was no need of an introduction. I was too much interested by the little I had seen, and the great things I had heard, of this man's powers and passions, not to improve the present opportunity to survey him in every light the length of his visit would permit. I accordingly recommended our brandy as superior, placing a pint-tumbler before him. No ceremonies retarded the libation; no inquiries solicited him upon any subject, till apprehensions of his

withdrawing suggested some topic to quiet him on his seat. Were I now to mention only the subjects of law, politics, news, et cetera, on which he descanted, I should not be believed, when I said his visit did not exceed thirty-five minutes. Imagine a man capable, in that space of time, to deliver some account of an entire week's proceedings in the trial, with extracts from memory of several speeches on both sides, including long ones from his own; to recite half columns *verbatim* of a series of papers, of which he said he is the author; to caricature Jefferson; to give a history of his acquaintance with Burr; expatiate on his *virtues* and sufferings, maintain his credit, embellish his fame, and intersperse the whole with sententious reprobations and praises of several other characters; some estimate, with these preparations, may be formed of this man's powers, which are yet shackled by a preternatural secretion or excretion of saliva which embarrasses his delivery. In this, his manner is rude, and his language ungrammatical; which is cruelly aggravated upon his hearers, by the verbosity and repetition of his style. With the warmest passions, that hurry him, like a torrent, over those characters or topics that lie most in the way of their course, he has, by practice, acquired the faculty of curbing his feelings, which he never suffers to charge the enemy till broken by the superior numbers of his arguments and authorities, by which he always out-flanks him, when he lets loose the reserve upon the center, with redoubled impetuosity. Yet fancy has been denied to his mind, or grace to his person or habits. These are gross, and incapable of restraint, even upon the most solemn public occasions. This is, at all times, awkward and disgusting. Hence, his invectives are rather coarse than pointed; his eulogiums more fulsome than pathetic. In short, every trait of his portrait may be given in one word — he is “the Thersites of the law.”

In Tyler's Life of Judge Taney an incident is related which throws light upon Martin's habit and capacity in this particular:

In a suit of great magnitude as to the interests involved, in which Mr. Taney was associated with Martin, which was to be tried at Hagerstown, the two started from Frederick, 26 miles distant, the evening before the appointed day of trial. At every relay (5 miles) Martin drank whiskey when he could get it, ale, or, if he could get neither, buttermilk. Arriving at Hagerstown they took supper, when Taney told Martin that after a cigar and a rest he would come to his room and go over the case with him. At 11 p. m. he did so, only to find Martin with hat, one boot, and all his clothes on, lying across the bed very much under the influence of liquor. Finding it impossible to arouse him, Taney returned to his own room distracted but not daunted and studied the case till daybreak. At the opening of the court Taney was in his seat, sure that Martin would not appear, as his room door was locked when Taney left the hotel, but just as the case was called in walked Martin and "in none of his forensic efforts," said Taney, "did he excel his skill in the management of this case."

The late Reverdy Johnson was wont to tell a similar story of his experience when, as a young lawyer associated with Martin, he drove with him from Baltimore to Annapolis to try a case. Stopping over night at the Half-way House, Martin got very drunk as usual. Mr. Johnson retired and had been asleep some hours, when he was awakened by Martin, who entered the room, lit a candle, threw himself on his bed, took a volume from his pocket and began to read. Much surprised, Mr. Johnson inquired as to the book which so interested him as to keep him from undressing and retiring at that late hour. "Young man," replied Martin, "I have of late always made it a rule to read a few pages from the book of Common Prayer before going to sleep."

That Martin knew the difference between "Philip drunk and Philip sober" was evidenced in the pretty well authenticated story of the definition of drunkenness that he gave to a certain Episcopal clergyman of Baltimore, who having been complained of by some of his parishioners for intemperate habits, sought Martin as his legal adviser. "Are you guilty?" said Martin. "That depends, sir," was the reply, "upon what you call drunkenness." "A man is drunk," replied Martin, "when after drinking liquor he says or does that which he would not otherwise have said or done"—a definition by the way, which has been much discussed *pro* and *con* in social as well as legal circles in Maryland since.

In the year 1822, Martin, ruined in body and estate, sought refuge with Aaron Burr in New York, where he was kindly received and gratefully cared for during his few remaining years. Chief-Justice Taney declared this act to be the only good thing he knew of Colonel Burr. Martin died of old age on the 10th day of July, 1826, in his seventy-ninth year. The biography which Daniel Webster is said to have drawn as embracing the life history of the average successful lawyer might well be applied to Luther Martin: "He worked hard, lived well, and died poor."

Whatever may have been the deficiencies of Luther Martin as a man, or as a statesman, he was, indisputably, a great lawyer. Not only is this demonstrated by his success in the practice of his profession,

in the number of important cases in which he was engaged, but it is the unanimous verdict of his contemporaries of the bar and on the bench. His standing among his professional brethren is illustrated by one of the most unique legislative acts that can be found on the records of any state. In 1822, after Martin was struck with paralysis, which impaired his intellect and rendered him incapable of business, the General Assembly of Maryland adopted the following resolution:

Resolved, that each and every practitioner of law in this State, shall be, and he is hereby compelled, from and after the passage of this resolution, to obtain from the clerk of the county court in which he may practice, a license to authorize him so to practise, for which he shall pay annually on or before the first day of June, the sum of five dollars; which said sum is to be deposited by the clerk of the county court, from which he may procure such license, in the treasury of the western or eastern shore, as the case may be, subject to the order of Thomas Kell and William H. Winder, Esqrs., who are hereby appointed Trustees for the appropriation of the proceeds raised by virtue of this resolution, to the use of said Luther Martin; PROVIDED, that nothing herein contained shall be taken to compel a practitioner of law to obtain a license in more than one court, to be annually renewed under penalty of being suspended at the bar at which he may practise. AND PROVIDED, That this resolution shall cease to be valid at the death of the said Luther Martin.

It is said that but one lawyer throughout the state is on record as ever having objected to paying this remarkable tax, and he was induced to withdraw his objections to its constitutionality before the case reached the appellate court!

No estimate of Luther Martin's place as a lawyer is more valuable than that of Roger Brooke Taney. Writing at the age of seventy-seven, after a personal acquaintance with him, and after an opportunity of measuring the leading lawyers of the country afforded to but few men, the Chief-Justice placed him at the head of the profession in Maryland. He gives an interesting description of his manner and personal appearance:

His dress was a compound of the fine and the coarse, and appeared never to have felt the brush. He wore ruffles at the wrist, richly edged with lace — although every other person had long before abandoned them — and these ruffles, conspicuously broad, were dabbled and soiled, and showed that they had not been changed for a day or more. His voice was not musical, and when much excited it cracked. His argument was full of digressions and irrelevant or unimportant matter, and his points were mixed up together and argued without order, with much repetition, and his speech was consequently unreasonably long. He was an accomplished scholar, and wrote with classical correctness and great strength. But in his speech . . . he seemed to delight in using vulgarisms which were never heard except among the colored servants or the ignorant and uneducated whites. . . . He seemed to take pleasure in showing his utter disregard of good taste and refinement in his dress and language and his mode of argument. . . . But with all his defects, he was a profound lawyer. He never missed the strong points of his case; and, although much might generally have been better omitted, everybody who listened to him would agree that nothing could be added. . . . He had an iron memory, and forgot nothing he had read; and he had read a great deal on every branch of the law.

Another writer has described Martin as not large, but of the medium size; muscular, but not heavy in form. He was near-sighted, and often appeared walking in the streets with a book or legal paper close to his eyes, entirely abstracted, and forgetful of everything around him. He was a mighty drinker, such as Professor Porson would have loved to meet. If we may judge from the case of *Harper vs. Hampton*,⁶ it is to be feared that his manner towards the judge on the bench was not always marked with deference. In that case the Chief-Justice (Jeremiah T. Chase) had rendered an opinion on one point against Martin's client to the effect that ten days had been ample time for certain legal notice to be given. The judge gave his opinion on the supposition that one party was in Baltimore and the other in Philadelphia, whereas one was at Baltimore and the other at Charleston, South Carolina. Martin responded to the ruling of the court by the remark: "None but an angel on the wings of the wind, could give notice at ten days at such a distance." The Chief-Justice informed Martin that he had a right to take an exception to the opinion of the court, but that he had no right to make any observations which tended to reflect on the court or induce bystanders to believe the court had been guilty of an absurdity; that he had been too much in the habit of such conduct and he was, so far as related to himself, determined to submit to it no longer; that so long

⁶ Harris & Johnson's Reports, 715.

as he held a seat on the bench he was resolved to have a proper respect paid to the court. He could not conceive what the distance of South Carolina from Philadelphia had to do with the opinion of the court. A moment later the court's mistake was made clear to him, and the Chief-Justice changed his ruling as to the notice, but he made no retraction as to Martin.

Comparisons between those who have achieved eminence at the bar are useless; each one had his special gift; some had many, none possessed all. Luther Martin's rank among his contemporaries is based solely upon his profound knowledge of the law and his skill in applying this knowledge to litigated cases. He was not an orator, not a statesman, not an organizer of great business enterprises; but as a lawyer, his associates at the bar ungrudgingly accorded him the highest rank, and the history of the period in which he lived affirms their judgment.

When Daniel Webster died, Rufus Choate delivered a memorial address before the Suffolk bar which will always be a model of oratory for such an occasion. In the course of his splendid review of the life of that great apostle of nationality, he made mention of the bar of the Supreme Court of the United States as it was composed in 1818, when Webster argued the Dartmouth College case. He says:

William Pinckney was recruiting his great faculties, and replenishing that reservoir of professional and elegant acquisition, in

Europe. Samuel Dexter, the honorable man and the counselor, and the eloquent orator, was in his grave. The boundless old-school learning of Luther Martin; the silver voice and infinite analytical ingenuity and resources of Jones; the fervid genius of Emmett pouring itself along *immenso ore*; the ripe and beautiful culture of Wirt and Hopkinson,— the steel point unseen, not unfelt, beneath the foliage; Harper himself, statesman as well as lawyer, these, and such as these, were left of that noble bar.

From a lawyer's standpoint, it is sufficient glory to be placed by Rufus Choate in such a company!

THEOPHILUS PARSONS.

THEOPHILUS PARSONS.

From a painting of Gilbert Stuart, executed in 1813 when Judge Parsons was sixty-three years of age. In possession of Mrs. J. L. Stackpole of Boston, a granddaughter of the Chief-Justice.



THEOPHILUS PARSONS.

1750-1813.

BY

FRANK GAYLORD COOK,

of the Massachusetts Bar.

THEOPHILUS PARSONS was singularly fortunate in his parentage and education. He was born February 24, 1750, in Byfield, a tract of about twelve square miles set off, at the beginning of the eighteenth century, partly from Rowley and partly from Newbury, Massachusetts, as a separate religious parish, and named from Colonel Nathaniel Byfield, of Boston. His father, Moses Parsons, was descended from good English stock of the gentry class that had taken root in Gloucester, Massachusetts, in the middle of the seventeenth century. The father graduated from Harvard College in 1736, and then for several years was a successful teacher in his native town of Gloucester, and, finally, taking up the study of theology, was ordained, in 1744, as the second pastor of Byfield. Moses Parsons's ministry began in troubled times. The wave of religious unrest—sometimes called "The Great Awakening"—that started with the preaching of Jonathan Edwards at Northampton, gradually spreading over New England, was accelerated to a

high tide by the fervor and eloquence of George Whitefield. Settled ministers were called to account by wandering evangelists; and restlessness invaded the pews. Byfield was no exception, as appears from the quaint diary kept by the pastor in an interleaved almanac from 1748 to five days before his death in 1783. These occasional murmurs seem not to have had much foundation; for, with uncommon candor and openness to the truth, the pastor welcomed Whitefield to his pulpit and his home. In 1770 the Byfield minister was one of the bearers at Whitefield's funeral. Outliving all opposition by a patient, steady ministry, he gradually gained a strong hold on his people and ended his ministry only with his death.

The triumph of Moses Parsons's ministry was largely due to his wife. In 1743 at Gloucester he was married to Susan Davis. Of much energy and ability she was well equipped in character and in mind for kindly service in the parish and a frugal care of her household. Upon a meagre salary of two hundred and eighty dollars, supplemented by the free-will gifts of their parishioners, Moses and Susan Parsons reared a family of five sons and two daughters—educating three of the sons at Harvard College—and at the same time dispensed in their home simple but gracious hospitality to a constant succession of guests.

Another great help was the nearness of Dummer Academy. Under the will of William Dummer, a

prominent citizen of Byfield and the lieutenant-governor of Massachusetts Bay, who died in 1761, all his real estate—his dwelling house and farm—in Newbury were given for the purpose of the erection on the farm of a schoolhouse and the maintenance of a grammar school master. As directed by the will the spot was selected by the minister and five of the principal freeholders of the parish; and the first schoolhouse—a low one-story building, about twenty feet square—was erected in 1762. Samuel Moody, of York, a graduate of Dartmouth College, who was recommended by Whitefield, was chosen the first Master; and February 28, 1763, the “Dummer Charity School” was opened by a dedicatory service with a sermon by Moses Parsons upon the text: “But the liberal deviseth liberal things, and by liberal things shall he stand.”¹

The text was a prophecy. The Master was a great success. Beginning with only twenty-eight pupils, he soon had more applicants than he could accommodate.² Though strict in discipline, with an ample supply of ferules, rules, and switches ever at hand, he was original in his methods. He would allow all the pupils to study aloud in the same room; and in season if high water came in school hours he would interrupt the study and send his pupils for a bath. During his arbitrary but beneficent reign of twenty-seven years over five hundred pupils came

¹ Isaiah xxxii, 8.

² Mrs. E. Vale Smith, *History of Newburyport*, p. 295.

under his influence. Dummer became the first incorporated academy in America, and Byfield an important literary centre.

It was in this school under Master Moody that Theophilus Parsons obtained his early training and his preparation for college. That he was a diligent and promising pupil is evident. The Master spoke of him with pride as "a brave boy"; and the pupil ever afterward cherished as a perennial inspiration a maxim of this school: "*Crede quod possis et potes.*" One who knew him at this time said: "He was always playing harder or studying harder than any other boy."³ When he was ready for college, although his elder brother Moses had been sent through Harvard only by great family sacrifices, nevertheless, through the timely and thoughtful gifts of the parishioners, the means were again gathered together. He entered Harvard College in 1765 at the age of fifteen.

Of his career in college we have but scanty information, apart from an interesting sketch of his character, drawn by his classmate, chum, and friend of forty-seven years, William Tudor, in 1774, when they were both twenty-three years of age.⁴ Though it is the fanciful and extravagant language of friendship, still evidently, as Judge Tudor is reported to have said later, "he was an insatiable student; and, after learning his lesson, would turn for his amuse-

³ Memoir of Theophilus Parsons by his son, p. 20.

⁴ Massachusetts Historical Collections, 2nd Series, p. 289.

ment to a mathematical problem, or a novel, with equal relish." ⁵

After leaving college he taught school at Falmouth, now Portland, Maine, for a little over three years, beginning in June, 1770; and the accounts which he kept of his compensation from the town and from his pupils, as well as of his expenses in riding horseback between Byfield and Falmouth, have been preserved. Receiving from the town about eighteen dollars per month and from each pupil in addition from thirty-three cents to one dollar a term he was obliged to handle his limited resources with frugality and prudence.

From a letter written to his younger brother, Theodore, at this time it would appear that his father entertained hopes of his becoming a minister; but these were in vain. Though assiduous in his teaching, he at the same time steadily pursued the study of law with Theophilus Bradbury, a prominent lawyer of Falmouth, who afterward removed to Newburyport and became a member of Congress and a justice of the Supreme Judicial Court of Massachusetts. This ambitious effort to make his time do double duty—gain him a living and fit him for the bar—not only required unremitting study out of his school hours but it also brought him in conflict with the rules of the court. According to the rule of the bar in the county of Suffolk, adopted in 1760 and later copied by the bar throughout the commonwealth,

⁵ 10 Massachusetts Reports, 534.

three years of study in a counsellor's office were required for admission to practice; and when young Parsons became a candidate in July, 1774, the objection was raised that his term of study had been divided with teaching. His reply was a request that he be examined, and, when this was granted, such an extensive knowledge of law was revealed that no further objection was raised. He at once began to practice law at Falmouth, and had already gained considerable reputation when upon the breaking out of the war the British burned Falmouth in 1776, and he was obliged to return to Byfield.

This event entailed most important consequences. He found installed as a boarder in his father's house Edmund Trowbridge, of Cambridge. Born in 1709 and graduated from Harvard College in 1728, the latter became one of that brilliant group of early lawyers, including Jeremy Gridley, Benjamin Prat, James Otis, Oxenbridge Thatcher, Benjamin Kent, Richard Dana, and Robert Auchmuty, who about the middle of the eighteenth century, by their high character and eminent talents, first secured standing and respect for their profession in Massachusetts; and are described with much shrewdness and some partiality in the racy diary of John Adams, then a youthful suppliant at the feet of Themis. Trowbridge was made attorney-general of the Province in 1749, and later a judge of the Superior Court. With the approach of the Revolution he found himself, either from holding the King's commission or

from a conservative temper, out of sympathy with the patriot cause. In 1772 he resigned his judgeship and, at the suggestion of relatives or friends, retired to seclusion and study at Byfield. Becoming a member of the Pastor's family he met there Theophilus Parsons who had been driven home by the burning of Falmouth. Finding the young man to be a promising and eager student he at once sent for his library, perhaps the only good one in the Province, and gladly assumed the direction of his legal studies. His own accurate and comprehensive knowledge of the law, especially as touching the life and customs of New England, was generally acknowledged. His pupil, when chief-justice of Massachusetts, paid him a tribute from the bench, saying that the late Judge Trowbridge "was an excellent common-law lawyer, of whose friendly assistance, in my early professional studies I cherish the most grateful remembrance."⁶ And Chancellor Kent in his *Commentaries* calls him "the oracle of the common law in New England." His treatise on mortgages was, through the influence and gratitude of his eminent pupil, given the extraordinary honor of publication in the *Massachusetts Reports*.⁷

The young man used this opportunity only too well. In this congenial, stimulating association he pursued his studies so closely that he seriously injured his health, and though only twenty-seven years old,

⁶ 7 *Massachusetts Reports*, 20.

⁷ 8 *Massachusetts Reports*, 550.

he appeared to be in the advanced stages of phthisis. At his mother's suggestion, taking the family horse, he wandered, walking and riding, over a considerable part of Massachusetts and New Hampshire. At the end of the tour he returned home much improved, but he never afterward enjoyed rugged health.⁸

Meanwhile while residing at Byfield he not only studied law, but also continued its practice as opportunity offered; and what he lost by leaving Falmouth he gradually made up in Newburyport and vicinity. Cut off from Newbury and incorporated as a separate town in 1764, Newburyport prospered from the first owing to her ready access to the sea and the enterprise of her citizens. The principal industry was shipbuilding. Within two years from her incorporation seventy-two vessels were in process of construction at one time. These were to a large extent sold to the British in return for their manufactured goods and the produce of the British West Indies; and hence Newburyport became the market town or commercial centre of the surrounding agricultural region extending even into New Hampshire, with Salem on one side and Portsmouth on the other as her nearest rivals.

At the same time there grew up an extensive and promising trade in small vessels with the French West Indies, which was practically unrestricted until England began her policy of interference cul-

⁸ Memoir, p. 331.

minating in the Stamp Act. Then the war intervened, destroyed maritime trade, broke up ship-building, and summoned the young men to battle. Twenty-two ships with a thousand men cleared from Newburyport that never returned. Nevertheless, the Newburyport shipbuilders were the leaders in every step in opposition. Few sacrificed more. Against their financial interests they rigidly enforced the non-importation agreement. They incurred debt for the expense of the harbor, and contributed liberally toward the support of the Colonial armies.

In the lapse of other business, resort was had to privateering. The first privateer fitted out in the United States sailed from this port, and belonged to Nathaniel Tracy. From 1775 to 1783 he was the principal owner of a hundred and ten merchant vessels, and of twenty-four cruising ships. Of the latter but one remained at the close; but they had captured from the enemy one hundred and twenty sail, yielding nearly four millions of specie dollars, and over two thousand prisoners, and the fragmentary narrative of their adventures, as told by occasional survivors, is a tale of almost unexampled pluck, endurance, and audacity.⁹

Among these brave seamen, young Parsons gained considerable business. In fact, during the war, there was little legal business except in maritime and prize law. "This led him to study with diligence the Civil Law, law of nations, and the principles of

⁹ Mrs. E. Vale Smith, *History of Newburyport*, pp. 106-7

belligerent and neutral rights.”¹⁰ In 1777 the tide of war having swept southward, the courts were revived and he settled in Newburyport. By 1780, at thirty years of age, he had acquired a lucrative practice and a wide reputation.

Meanwhile he had been drawn into the social life of the town, and perhaps nowhere in Massachusetts, apart from Boston, was society so cultured and refined. At the approach of the Revolution, “its population,” says a trustworthy local writer, “was small—actively engaged in commercial pursuits—under the direction of some of the most intelligent and distinguished merchants of New England. Several of these gentlemen had been associated in early life at the university, and others were connected by nearer ties.”¹¹ Indeed, about the beginning of the nineteenth century, no town in the commonwealth, in proportion to its population, furnished Harvard College with so many students and instructors. Among the latter were Samuel Webber, Elaphalet Pearson, and John S. Popkin.

After the war, with the revival and rapid growth of trade and shipbuilding, wealth poured in upon the citizens with all its accompaniments of luxury and ease. There were handsome residences with deep wine cellars, well stocked with Port and Burgundy, family carriages with footman and coachman, and saddle horses for the ladies. Rich silks, velvets, and

¹⁰ 10 Massachusetts Reports, 525.

¹¹ Samuel L. Knapp, *Biographical Sketches*, p. 315.

laces imported in ships direct from France were displayed to an advantage in the spacious assembly room, and its connecting, elegantly furnished drawing rooms, that stood on Temple Street; while such families as the Lowells, the Jacksons, the Tracys, the Daltons, and the Greenleafs gave distinction and honor to the town. The elegance and cordiality of their hospitality are vividly described by the Marquis de Chastellux in his account of his entertainment in 1782 by "Mr. John Tracy, the most considerable merchant in the place,"¹² at his handsome country house standing in a beautiful situation in the midst of terraced gardens about a mile from the town.

Into this select circle the young lawyer was cordially welcomed. Doubtless his father's position and reputation would have commended him had it been necessary. He had scarcely opened his office when everybody was talking about him,¹³ such was the learning and ability that he displayed. In 1779, invited to dine at the residence of the Honorable Benjamin Greenleaf, the judge of probate of Essex County, he was introduced to his daughter Elizabeth, the granddaughter of Dr. Charles Chauncey, of Boston, and fifth in descent from Dr. Charles Chauncey, the second president of Harvard College. This acquaintance led to their marriage the ensuing year. In 1789, purchasing of his father-in-law a large lot on the corner of Green and Union streets,

¹² Travels in North America, vol. II, 244.

¹³ Currier, Auld Newbury, p. 332.

he built upon it a spacious mansion with stables adjoining; and in a low, one-story building on the easterly corner of the lot he had his office. This residence is still standing though considerably changed in appearance and use. Here he reared a large family and spent the greater part of his professional life. He kept servants and horses, and dispensed liberal hospitality.¹⁴ He formed for the town and its people a warm attachment that lasted to the end of his life, and he contributed liberally of his time and his means to its various activities for the common welfare. He was one of the several enterprising citizens who furnished the money to start at the "Falls" in Newbury the first incorporated company for the manufacture of woolen goods in the United States.¹⁵

It was perhaps inevitable that early in his career, partly from the stagnation of legal business and partly from the demand for public service, he should be drawn into politics. Even while engrossed in legal study at Byfield he was keenly alert to the political situation, as appears from a letter he wrote in 1776 to an acquaintance in Falmouth.¹⁶

If the present plan of accommodation shall miscarry, I shall tremble for my country. But if the present union shall continue indissoluble, I have great hopes we shall finally disappoint the malice of our enemies, and hand to posterity that blessing of liberty

¹⁴ Memoir, p. 135.

¹⁵ Currier, *History of Newbury*, p. 293. Ewell, *Story of Byfield*, p. 167.

¹⁶ Memoir, p. 41.

which our ancestors bequeathed to us. But if the same legacy can be transmitted without risking the prosecution of a civil war, who but villains will run the risk?

When, however, hope of concession from England died away, and independence was declared, he gave hearty support to the patriot cause.

One early result of the Declaration was the need of a new constitution, or form of government. Though local government went on, as it were, automatically, the royal charter had been discarded, and must be replaced by the fiat of the people. In Massachusetts the steps first taken to this end were ill-considered and abortive. Early in 1778 the General Court had the presumption of its own motion to draft a constitution and submit it to the people for approval. The latter preferred to do this work themselves, especially as the form submitted to them seemed wholly inadequate to the need. It contained no bill of rights, and it made the executive a weak figurehead, subordinate to, and a member of, the legislature.

Among the earliest to resent the presumption of the General Court and to discern the defects in its plan were the men of Essex County. Newburyport led the way. In a town meeting, March 27, 1778, it was declared that the mode of representation as proposed was unequal and unjust, and that other parts of the plan were not founded on the true principles of government, and the selectmen were requested to invite, by circular letters, the several towns

in the county to send delegates to a convention to consider the proposed constitution, and it was voted to choose as five delegates to this convention, Theophilus Parsons, Tristram Dalton, Jonathan Greenleaf, Jonathan Jackson, and Stephen Cross. Soon afterward the convention, thus summoned, met, and, after pointing out in a series of resolutions the defects of the proposed constitution, voted: ¹⁷

That Mr. Parsons, Mr. Goodale, and Mr. Putnam be a committee to attempt to ascertain the true principles of government; to state the non-conformity of the Constitution prepared by the Convention of this State to those principles; and to delineate the outlines of a Constitution conformable thereto; and to report the same to this body.

The report of this committee, written by its chairman, Theophilus Parsons, and presented at an adjourned meeting of the Convention held at Ipswich, April 29, 1778, is commonly known as "The Essex Result." In accordance with the above instructions, it first ascertained by analysis and discussion and stated with precision the true principles of republican government, defining political liberty, asserting the supremacy of the majority, and stating upon what principles and in what method such supremacy may be exerted in a republic so as to secure that liberty to the individual; secondly, it pointed out in detail the numerous particulars in which the constitution proposed by the General Court violated the

¹⁷ Memoir, p. 49.

principles of republican government thus ascertained; and finally, it boldly set forth a systematic and consistent plan in outline of a constitution deemed to be suited to the need and conformable to true principles.

It is said that the author of this production was never satisfied with its style, that he believed he had failed in his aim to enlist the popular feeling as well as to convince the understanding, and hence that he became convinced that his ability did not lie in such efforts.¹⁸ But this has not been the opinion of others. The report was printed in a large edition and was widely circulated. Appearing at a time when most of the patriots were engrossed in prosecuting the war for independence, it anticipated many of the principles later incorporated in the state and national governments. As an early, sound, and discerning statement of the true principles underlying republican government, it is one of the valuable documents connected with American liberty.

In its immediate effect, also, it is most important. It undoubtedly led to the speedy rejection by the people of the unsuitable plan proposed by the General Court, and it had a great moulding influence upon the plan of government finally adopted by Massachusetts as a constitution in 1779. In fact in the convention that framed this instrument, Parsons was the leading delegate from Essex County; and according to Chief-Justice Parker, "many of the most

¹⁸ Samuel L. Knapp, *Biographical Sketches*, p. 45.

important articles of the Constitution were of his draught, and those provisions which were most essential, though least palatable, such as dignity and power to the executive, independence to the judiciary and a separation of the branches of the legislative department, were supported by him with all the power of argument and eloquence which could be derived from deep historical information and wise reflections upon the nature and character of mankind." ¹⁹

These great principles of constitutional liberty, set forth by him so logically, discreetly, and consistently in "The Essex Result," and incorporated in the fundamental law of Massachusetts and other states and of the Nation, have for the most part been approved by subsequent experience and are today the basis of our government. To be sure, one principle that he there advocated with great earnestness and it would seem with unescapable logic, citing the words of Lord Chatham and the practice in Massachusetts Bay in meetings of proprietors of common and undivided lands, has been gradually discarded. And this is, that, in the exercise of power that affects property, not citizenship only but property also should be represented. Though adopted at first in the constitution of Massachusetts in the provision for the election of senators, it has since then been eliminated by amendment. Nevertheless, it is still supported by political thinkers who, like Parsons, are

¹⁹ 10 Massachusetts Reports, 531.

at once broad and conservative, as founded in justice and truth.

An immediate effect of this bold initiative and dominant influence, manifested by Parsons, was to give him a great reputation for political sagacity and leadership. And this was enhanced by the part he played in the Convention that assembled in 1788 to determine whether Massachusetts would ratify the new constitution proposed for the United States. A curious and complicated division of sentiment appeared in this body from the start; and had a vote been taken at once ratification would have been defeated by a large majority.²⁰ This majority was composed largely of the rural delegates, some of whom had actually participated in the recent uprising against the courts and other public authority, known as Shays's Rebellion. They were in no mood to grant to government the increase of power embodied in the Constitution. Moreover, their pre-existing irritation had been unwisely fanned by the intemperate advocacy of that instrument in the public press prior to the meeting of the Convention.

But the majority lacked leadership. Had they won over John Hancock and Samuel Adams, hitherto the leaders of the people, they might have worked their will. But these men, though sympathizing with them, were opposed to one another and hesitated to take a stand. This circumstance

²⁰ Samuel B. Harding, *The Federal Constitution in Massachusetts*, p. 67.

was manipulated with great adroitness by the advocates of the Constitution. The latter had come largely from Boston and its neighborhood, and comprised some of the ablest men in the state—Nathaniel Gorham, Caleb Cushing, and Rufus King, who had sat in the Constitutional Convention; former Governor Bowdoin, Generals Heath and Lincoln, and Theodore Sedgwick, Francis Dana, Fisher Ames, and Theophilus Parsons. These men made up their lack of following by their patience and good sense. They shelved Hancock by aiding in his election as presiding officer; and Samuel Adams they industriously conciliated and placated; while to the rank and file in opposition they listened with steady patience and self-restraint, answering repeatedly but mildly the untenable arguments they advanced.

In this waiting game Parsons proved one of the most ready and efficient players. "Parsons to me," said Chief-Justice Parker, an eye-witness, "appeared the master spirit . . . Upon all sudden emergencies, and upon plausible and unexpected objections, he was the sentinel."²¹ It is said that when a member who was a minister asserted that an angel could not have presided at the birth of the Constitution because it did not contain the name of God, Parsons deftly turned the point by the quiet remark that likewise the Book of Esther which does not name the Deity might be condemned. When, after all, the issue seemed doubtful, he led the way in a

²¹ 10 Massachusetts Reports, 532.

diversion that finally won. Realizing that much of the opposition was honest and reasonable, the Federalists prepared a series of resolutions, commonly called the "Conciliatory Resolutions," which while they unconditionally ratified the Constitution, at the same time presented several amendments, covering the most objectionable points, for future consideration. And they secretly induced Hancock to end his protracted absence, take the chair, and himself propose these resolutions to the Convention. The plan succeeded. The Constitution was ratified, but by a majority of only nineteen in a total vote of three hundred and fifty-five.

That Theophilus Parsons was the author of the "Conciliatory Resolutions" there appears to be no doubt. The original draft in his handwriting was found among the papers of John Hancock after the latter's death. In their construction he no doubt had the counsel of his fellow leaders. He also had their approval. For even the most ardent supporters of the Constitution did not quite assent to it as it stood; and the need of amendment was generally admitted. The amendments were brought forward, therefore, not simply to facilitate the ratification of the Constitution but also to supplement that instrument; and it is important to note that the latter purpose was accomplished as well as the former. For at least three of the amendments, contained in the "Conciliatory Resolutions" and adopted by Massachusetts, were soon at the suggestion of Congress approved

by the several states, and became an important part of the Constitution. These are: first, That all powers not expressly delegated to Congress are reserved to the several states; second, That in civil actions between citizens of different states, every issue of fact arising in an action at common law shall be tried by a jury, if the parties, or either of them, request it; and third, That no person shall be tried for any crime, by which he may incur an infamous punishment, or loss of life, until he be first indicted by a grand jury, except in such cases as may arise in the government and regulation of the land and naval forces.

Notwithstanding the preëminent value of these services, Parsons never claimed any credit for them. He did not sign the "Essex Result," nor ever publicly claim to be its author. He seldom took part in the debates. In his whole life he never published anything under his own name—apart from his decisions as chief-justice. He disliked and shunned notoriety. In one instance, however, he permitted and even welcomed an exception. He was proud to be known as a member of the "Essex Junto." This term, applied at first by Hancock to the friends of his opponent, James Bowdoin, in Essex County, namely: Jonathan Jackson, John Lowell, and Theophilus Parsons, of Newburyport; George Cabot and Nathan Dane, of Beverly; Timothy Pickering and Benjamin Goodhue, of Salem;²² was later loosely

²² Amory, *Life of Sullivan*, vol. II, 123.

extended in political talk to the leaders in Essex and Suffolk counties who were most active in supporting the Constitution. Of this group Parsons was generally believed to be the leading spirit. The close friendship and counsel among these men, especially in support of Federal measures, made them a formidable body to their political opponents, and the name "Essex Junto" gradually gained a national vogue and meaning as the New England leaders acquired ascendancy in Federal policies.

Though pleased with this name and its associations, and strictly loyal to Federal principles, Parsons was never willing to accept the responsibilities or perform the duties of a political leader. Though willing to counsel, he would not act. He was thus a severe trial to his political friends. As early as 1788 Fisher Ames wrote:²³

It seems to your friends that you, who are our Ajax, are deserting the common cause by your absence. . . . Accept this letter as the effect of the combined wishes of the Federalists, who need your aid, and have long been in the habit of trusting it.

He did indeed serve for a time in the General Court, but in general he was averse to political office. He promptly declined the appointment, tendered him by President Adams, to the office of attorney-general of the United States.

But to every call to duty in his profession he responded with alacrity, at times even at the expense

²³ Memoir, p. 462.

of his health. His occasional appearances in political gatherings, as above described, seem but slight incidents compared with the steady growth in range and importance of his legal practice. At the very start, in Falmouth, "at his first term," says his son, who had before him his father's docket books covering his professional life, "he made 59 writs, of which 13 were entered as issuable cases."²⁴ And this was before he had the benefit of study with Judge Trowbridge. With such a beginning the forced removal from Falmouth seemed a misfortune, but it proved the contrary; for it gave him a teacher enthusiastically devoted to legal science, and the use of a law library unequalled in America.

Fairly to estimate these advantages one must bear in mind what were then the conditions of legal study and practice. Law books were scarce and expensive, being mostly imported from England at considerable risk. James Sullivan, a contemporary of Parsons, ventured to purchase a valuable collection of books in England; but the ship conveying them was lost or captured.²⁵ Comparatively few law books existed. Blackstone published his Commentaries in 1765. These, with Burrow's Reports, Coke upon Littleton, Wood's Conveyancing, Hobart, Saunders, and the Year Books were among the principal authorities. During the War for Independence the law books of fugitive Tories were confiscated. In

²⁴ Memoir, p. 26.

²⁵ Amory's Life of Sullivan, vol. II, 4.

Boston they were deposited in the Province House, and later sold to judges by authority of the Legislature. Thus Judge Sullivan in 1779 obtained Modern Entries, the Pleas of the Crown, Foster and Hawkins, and the Reports of Strange, Kelyng, and Burrow, which had belonged to Jeremiah Gridley.²⁶

Even when the leading English cases were obtained, they were applied only with the greatest difficulty, so different was Colonial experience. No reports of American cases had yet been published. Some notes of decisions in manuscript were passed around or handed down. Thus about 1763, Josiah Quincy, Jr., while a student under Oxenbridge Thatcher and early in his practice, collected in manuscript "Reports of cases and points of law, solemnly adjudged in the Supreme Court of the Province," partly notes taken by himself and partly copied from the minutes of eminent lawyers. Published as Quincy's Reports, a hundred years later, they have brought down to us the arguments of Auchmuty, Thatcher, Gridley, Otis, and Adams.²⁷ Usually each lawyer had his book of forms which he copied when a student, with such additions as had sprung from his own experience at the bar; and before the courts he must be ready and proficient in that puzzling system of special pleading which through centuries had been trimmed and polished into an exact science. Demurrers, pleas, replications, re-

²⁶ Amory's *Life of Sullivan*, vol. II, 4.

²⁷ *Memoir of Josiah Quincy, Jr.*, by his son, p. 7.

joinders, rebutters must be duly applied under strict rules enforced with severe penalties, all to the end of reaching a clear and definite issue, and of limiting the argument thereto.²⁸

With the leading authorities in English law and an experienced guide at hand, Parsons was so thorough in his studies that he carefully examined and collected in manuscript the leading cases and precedents on a wide variety of subjects. When therefore, he resumed the practice of law at Newburyport he had a great advantage over other lawyers of his time. From the first his knowledge of the law was phenomenal, and not less so was his intellect. It is said that he never spoke from a brief, and seldom hesitated for an authority. There was nothing surprising then in his rapid rise to acknowledged leadership at the bar, and to a lucrative and extensive practice, especially as the return of peace gave a great impetus to legal business. In 1784 he had eighty writs returnable at the April term of court in Essex County alone. At the same time his counsel and voice were more and more sought in all parts of New England.

One mark and consequence of his fame was the fact that students sought his office. Thither fresh from Harvard College went Rufus King in 1777, and John Quincy Adams in 1788, to complete the requisite three years' study for admission to the bar. Other students were Charles Jackson, later a judge of

²⁸ Amory's *Life of Sullivan*, vol. II, 5.

the Supreme Judicial Court, and Robert Treat Paine, Jr., who made a vain attempt to add the practice of law to the pursuit of literature.

It was to be expected that a man of such talent and equipment would soon outgrow a country town; and it was a tribute to the attractions of Newburyport that he remained there so long. He was deeply rooted in its associations, and was held by family ties. But in 1799 his father-in-law, the Honorable Benjamin Greenleaf, died; and business and kindred called him to Boston. He moved thither the next year. A farewell dinner was given him by his Newburyport friends; and the following significant toast was proposed by his former pupil, the poet, Robert Treat Paine, Jr.: ²⁹

Theophilus Parsons, the oracle of law, the pillar of politics, the bulwark of government.

When Parsons, at fifty years of age, took up his residence in Boston, his reputation for profound and accurate knowledge of law, and for keenness and strength of intellect was unequalled at least in New England. His chief competitors were Samuel Dexter, Harrison Gray Otis, James Sullivan, and John Lowell. In 1802 Fisher Ames, also a contemporary practitioner of high standing, in urging his friend Christopher Gore, who was then in England as a member of the commission on British Spoliations, to return to Boston and resume the practice of law,

²⁹ Memoir, p. 135.

thus commented in his inimitable manner on these men:³⁰

Who are the rivals for this business with whom you must divide the booty? Parsons stands first, but he is growing older, less industrious, and wealth, or the hypo, may stop his practice. Otis is eager in the chase of fame and wealth, and, with a good deal of eloquence, is really a good lawyer and, improving. He however sighs for political office—he knows not what; and he will file off the moment an opportunity offers. Dexter is very able, and will be an Ajax at the bar as long as he stays. You know, however, that his aversion to reading and to practice are avowed, and I believe sincere. His head aches on reading a few hours, and if he did not love money very well, he would not pursue the law. Sullivan, who seems immortal, is admonished of his decay by a fit every three months, and will not be in your way. . . . I have reckoned all the persons who pretend to be considerable. John Lowell's health is wretched.

In this confidential estimate there was much discernment, colored perhaps by some personal feeling. Afterward Otis did fulfill a long and varied career in office, as member of both houses in the state legislature, delegate to the Hartford Convention, senator of the United States, judge of the Court of Common Pleas, and mayor of Boston. And it would be difficult to embrace more truth of Dexter in as few words. But of Sullivan, opposed to Ames in politics, much more should be said. Of them all he was, all in all, the one who could stand up against Parsons with the least disadvantage. These two were often pitted against one another, especially in

³⁰ Works of Fisher Ames, vol. II, 300.

maritime, prize, commercial, and insurance cases. At times they would clash in heated discussion and sharp retort, though in private they were the best of friends. Once in the trial of an action to recover insurance for a loss in shipwreck, Parsons, in painting vividly the horrors of the disaster, inadvertently spoke of the wind blowing off a leeshore; Sullivan, interrupting, asked how that could be. Instantly Parsons turned upon his opponent, and thundered: "It was an Irish hurricane, brother Sullivan."³¹ Sometimes they were retained together; and they made a strong team. In 1784, with John Lowell, they acted as commissioners in the settlement of the controversy between Massachusetts and New York over the ownership of western lands.³² Again in a case in the United States Court at Hartford before Chief-Justice Ellsworth, Parsons and Sullivan were opposed to Egbert Benson and Alexander Hamilton. The New York men deliberately took the unusual course of challenging the whole panel of the jury, greatly to the surprise of their Boston opponents. But quickly recovering, Parsons, directing Sullivan to hold the attention of the court by continuous argument, hastened to Ellsworth's office and soon returned with enough law to defeat the manœuvre. After this trial, Hamilton, chagrined at his defeat, asked Parsons whether he had anticipated that point. "Not in the least," was the reply, "but so long ago

³¹ Amory's *Life of Sullivan*, vol. II, 4.

³² Knapp's *Biographical Sketches*, p. 298.

as when I studied with Judge Trowbridge, the question was suggested to me, and I made a brief of the authorities, which I happened to have brought here with me, and I found the books in Judge Ellsworth's library." ³³ This readiness and ease were characteristic. They might well have been mistaken by as close a friend as Fisher Ames for a disinclination to work. There was no need to dig and scrape. That had been done in his early study. And ever after an unerring, unfaltering memory supplied every need from its own rich stores.

Unlike Sullivan, Dexter, Otis, and Ames, Parsons was not an orator. His manner before a jury was simple, direct, and confidential. One instance has been described by Chief-Justice Isaac Parker, who was an interested observer. In addressing the jury, Parsons, with one foot on the chair and an elbow on his knee, leaned over and spoke quietly as if he were among his friends. "He made no show; he treated the case as if it were a simple affair, of which the conclusion was obvious and inevitable; and he did not talk long. He got a verdict at once." ³⁴ "His great talent," says the same authority, "was that of condensation. He presented his propositions in regular and lucid order, drew his inferences with justness and precision, and enforced his arguments with a simplicity, yet fulness, which left nothing obscure or misunderstood." ³⁵

³³ Memoir, p. 138.

³⁴ Memoir, p. 143.

³⁵ 10 Massachusetts Reports, 526.

While not an orator, he excelled in the flow, variety, and richness of his expression. He was capable of deep feeling, and could express it with force, and he possessed vivid imagination. Indeed, Chief-Justice Parker asserts "Instances may be recollected when, in cases which required it, he has assailed the hearts of his hearers with as powerful appeals as were ever exhibited in the cause of misfortune or humanity."³⁶ Nevertheless, he did not believe eloquence to be advantageous to a lawyer and he studiously avoided it.³⁷

Upon his manner and method as a lawyer the following comment of Webster in his journal in 1804, when he was studying law in Boston, is both instructive and entertaining:³⁸

When Parsons intends to make a learned observation, his eye-brow sinks: when a smart one,—for he is, and wishes to be thought, a wit,—it rises. The characteristic endowments of his mind are strength and shrewdness. Strength, which enables him to support his cause; shrewdness, by which he is always ready to retort the sallies of his adversary. His manner is steady, forcible, and perfectly perspicuous. . . . A great scholar in everything, in his profession he is peculiarly great. He is not content with shining on occasions; he will shine everywhere. As no cause is too great, none is too small for him. He knows the great benefit of understanding small circumstances. It is not enough for him that he has learned the leading points in a cause; he will know everything. His argument is, therefore, always consistent with itself; and its course so luminous, that you are ready

³⁶ 10 Massachusetts Reports, 526.

³⁷ Memoir, p. 146.

³⁸ Memoir, p. 148.

to wonder why anyone should hesitate to follow him. . . . He has no fondness for public life, and is satisfied with standing where he is, at the head of his profession.

As the leader of the bar he appeared only in the most important causes, and usually as counsellor or barrister. Throughout his career at the bar the term barrister was used to designate the highest grade in the profession. Copied, no doubt, from the English practice, the Order of Barristers in Massachusetts in 1768 comprised twenty-five members, distributed over the Province. Subsequently thirty-one more were admitted, including Parsons; and these fifty-six are believed to be the only persons ever admitted to practice as barristers in Massachusetts.³⁹ The requirements for admission to the Order of Barristers were three years preparatory study, two years practice in the Court of Common Pleas, and two years later practice in the Superior Court of Judicature. In 1781 in the records of the latter court the order was entered that "no gentleman shall be called to the degree of Barrister until he shall merit the same, by his conspicuous bearing, ability and honesty; and that the court will, of their own mere motion call to the bar such persons as shall render themselves worthy as aforesaid." Two years later, this court having become the Supreme Judicial Court, it was ordered: ⁴⁰

That Barristers be called to the bar by special writ (reciting its terms) . . . which writ shall be fairly engrossed on parch-

³⁹ Davis, *History of Judiciary of Massachusetts*, p. 298.

⁴⁰ Davis, *History of Judiciary of Massachusetts*, pp. 296-297.

ment and . . . kept as a voucher of his being legally called to the bar, and the Barristers shall take rank according to the dates of their respective writs.

In 1806, a few months before Parsons took his seat as chief-justice, the term barrister was superseded by that of counsellor. The *Regulæ Generales*, adopted that year at the March term of the Supreme Judicial Court, prescribed for admission to practice as an attorney, a "good school education, seven years devoted to literary acquisition," and three years "in the office and under the instruction of a Counsellor or Barrister"; and for admission to practice as a counsellor, two years' practice as an attorney. For admission to both grades an examination, also, was required, by examiners appointed by the court from the barristers and counsellors. For 1806 the examiners appointed were, in the order named: Theophilus Parsons, Christopher Gore, Samuel Dexter, Harrison Gray Otis, William Sullivan, and Charles Jackson.⁴¹

As a barrister, in the earlier part of his career, Parsons wore a dark woolen gown, and a bag-wig; later he discontinued them. His personal appearance at fifty-five is thus vividly described by Webster in his Journal: ⁴²

Of large stature, and inclined a little to corpulency. His hair is brown, and his complexion not light. . . . His forehead is low, and his eyebrows prominent. He wears a blue coat

⁴¹ 2 Massachusetts Reports, 72.

⁴² Memoir, p. 148.

and breeches, worsted hose, a brown wig, with a cocked hat. He has a penetrating eye of an indescribable color. When, couched under a jutting eyebrow, it directs its beams into the face of a witness, he feels as if it looked into the inmost recesses of his soul.

He usually traveled over the state, with the court, on its circuit, interviewing the client only just before the trial of his cause, and after it had been prepared by an attorney. As the judges on the Eastern Circuit were occasionally, during ten weeks of the spring, every day in court or on the road, he had to endure long absences from home.⁴³

Out of court, he transacted all his legal business at his residence. In like manner his great competitor, James Sullivan, the latter part of his professional career, had his office at his home on Hawley street.⁴⁴ Upon moving to Boston, Parsons lived first on Bromfield street, on the site occupied later by the Indian Queen Tavern, and still later by the Bromfield House. In 1801 he bought a house with a large garden on the easterly side of Pearl street—his home for the remaining twelve years of his life. Domestic in his habits and happy in his family relations, he found in his home his main—almost his only—social enjoyment. Though social by nature and brilliant in conversation—when he willed—he seldom made social calls or visits, or attended a political meeting or any other public gathering. He was content with the Saturday dinners at his home

⁴³ Amory's *Life of Sullivan*, vol. II, 89.

⁴⁴ Amory's *Life of Sullivan*, vol. II, 89.

to which he was in the habit of inviting his pastors, Doctor Kirkland and his successor Doctor Thatcher, and other friends, and also noted strangers that had been brought to his acquaintance. He was unwilling to spare any more time from his books. In fact he was a true scholar, or, in the words of Charles Sumner: "A cultivator of liberal studies, a student of knowledge in its largest sense."⁴⁵ He was a lover of books, choice writers, good bindings, and best editions. He imported them at heavy expense, but with such good judgment that after his death his library of six thousand volumes was sold for more than it had cost.⁴⁶ Not only was he an omnivorous reader but he read to a purpose. His general information was astonishing. At the same time he had his favorite studies; and strange to say law was not among them. His friend John Lowell is reported to have said: ⁴⁷ "While Parsons knew more law than any other man, he knew more of everything else than of law."

His favorite studies were Greek, the physical sciences, and mathematics. He took up the critical study of Greek after he was thirty, and with a view to facilitate its early study in the schools, he began, when about forty years old, to prepare a Greek grammar in English, the grammars then in use being in Latin. When the work was nearly done, its

⁴⁵ Sumner's *Orations*, vol. I, 137.

⁴⁶ *Memoir*, p. 263.

⁴⁷ G. J. Clark's *Sketches of Eminent Lawyers*, vol. II, 186.

object was attained by the reprint in the United States, and with his recommendation, it is said, of a similar work recently published in England; and his own manuscript was cheerfully laid aside. He corresponded regularly with a distinguished professor of Greek in the University of Leyden; and he had an abridged edition of the "Greek Primitives" printed for the use of a private school that he had aided in starting. While he preferred Greek, he procured a full collection of the Latin classics, and he could read and write the latter language also with ease.⁴⁸

It is strong testimony to his ardor, originality, and attainments that, at a time when so few were yet interested in physical science, he not only procured and employed several of the more important instruments and devices then in use, but actually invented and successfully developed some new apparatus and experiments of his own; and among his intimate friends and frequent visitors were Reverend Dr. John Prince, of Salem, then a principal importer of scientific machinery and apparatus; and William Bond, an English goldsmith, who had wandered to Boston and become the chief dealer in watches and chronometers. In 1806,—the year in which he became chief-justice—in company with a few scientific friends, he took observations from the top of his house and, with the best instruments he could procure, of the eclipse of the sun which took place at

⁴⁸ Memoir, p. 272.

that time and which he had predicted years before as a student; and the results, being communicated widely, were made the basis of important calculations.⁴⁹

Mathematics, however, were his prime favorite. Upon this subject many manuscripts were among his papers at his decease, dating from his preparation for college down to the end of his life. From his suggestions, an improvement was made in obtaining longitude by lunar observations. He discovered new methods of investigating a comet's path, and he furnished many of the rules and forms used by Nicholas Pike, of Newburyport, in "Pike's Arithmetic," published in 1788, at the same time forbidding any mention of their source. The summer before he died he was absorbed with a paper on the theory of parallel lines. "When fatigued with the labor of deep research," says Chief-Justice Parker, "or exhausted by a continued train of thought upon one subject, it was not uncommon for him to relax his mind with some abstruse arithmetical or geometrical demonstration, or to turn over the pages of some popular and interesting novel."⁵⁰

His distinction as a man of science and of letters was generally recognized. In 1807 he was one of the founders of the Boston Athenæum, and was its first president. He received the degree of Doctor of Laws, in 1804, from Harvard University, and in

⁴⁹ Memoir, p. 276.

⁵⁰ 10 Massachusetts Reports, 534.

1809 from Brown University. He was a Fellow of Harvard College from 1806 until just before his death. In this office he felt deep interest and gave freely of his time and thought. It was mainly through his influence that Dr. John Thornton Kirkland, his own pastor at the New South Church, became the successor of Samuel Webber, in 1810, as president of the College; and he prepared a bill that speedily passed the Legislature reconstructing the Board of Overseers. In 1805 he subscribed liberally for the founding of a professorship of natural history. Withal and in all he was a firm believer in revealed religion, becoming a member of the New South Church toward the end of his life. He took this step, convinced by Doctor Kirkland that it was his duty, although he was not and could not be a regular attendant, because of the infirmity of his health.

Infirm health appears to have been part of the price paid for his extraordinary mental activity and achievement. "When not called off by business," said one of his contemporaries, "his daily habit was to sit and study, from twelve to fifteen hours a day all his life; and this without exercise or relaxation."⁵¹ The impairment that his constitution suffered from the excessive study of his youth was increased by his intense application and his neglect of physical exercise the remainder of his life. Nervous disorders and chronic indigestion became fastened

⁵¹ Familiar Letters, by William Sullivan, p. 385.

upon him, and finally brought him to severe hypochondria. As Chief-Justice Parker expressed it: "He shrunk at an eastern breeze, and started at the slightest pain."⁵² Often he would be confined to his bed for weeks, until suddenly upon the opening of court he would be found in his place as usual.

It is fortunate that a mind so original, cultivated, and profound and at the same time so alive to the calls of duty, was applied at the height of its powers to constructive work in jurisprudence. In 1806 Theophilus Parsons became chief-justice of Massachusetts. He did not accept this office without much hesitation. He had a large family to support, and he did not possess wealth. He hesitated therefore to give up an income of about ten thousand dollars a year from his profession for a meagre salary of twelve hundred and thirty-three dollars a year, attached to the office of chief-justice. He concluded to accept the office, but in his letter of acceptance he called attention in modest and dignified terms to the inadequacy of the salary. This letter was incorporated by the Governor soon afterward in his message to the Legislature, and through the discreet exertions of Joseph Story then in the House, the salary was increased to twenty-five hundred dollars. Three years later, when finding that this increased salary was entirely insufficient for the proper support of his numerous family he was about to resign his office, the amount was again raised by the

⁵² Memoir, p. 333.

Legislature, through Story's influence, this time to thirty-five hundred dollars.

But the sacrifice which he made in accepting this office was not measured in income alone. The labor pertaining to it, always onerous, was then greatly increased, to use Parsons's own words, "by the immense mass of business which had accumulated in that court, and by the little time allowed to the judges for deliberation before decision."⁵³ The causes of this stagnation were many and of long standing. Although over twenty years had passed since the war for independence but few changes had been made in the cumbersome judicial system that had existed in the Colonial period. Besides the justices of the peace with jurisdiction over petty causes, there was in each county a Court of Common Pleas consisting of four judges, who as a rule had little legal training and steadily resisted being reformed out of office. Their inefficient conduct of legal business, by causing frequent appeals to the Supreme Judicial Court, had so seriously crowded its docket that causes would remain upon it three years before being heard. This delay was often due partly to the dilatory tactics of the bar. Delay had become profitable by the abuse in practice of the system of costs. The thirty-three cents allowed a prevailing party for each day's attendance in court were no longer charged for actual attendance only. The practice had crept in to make the charge for

⁵³ Letter to the Governor, *Memoir*, p. 228.

each day, whether the party actually attended or not, and upon the theory, it is said, that his attorney might be present. In any case the attorney appears to have pocketed the money, and hence there was a great temptation to delay.

These abuses bore heavily upon the community, and gave some grounds for the popular unrest and indignation against the courts and the lawyers which contributed so materially to Shays's Rebellion in 1786; and it was partly due to this need and demand for reform that the chief-justiceship was offered to Parsons. When in 1806 Francis Dana resigned this office, the senior associate-justice was Theodore Sedgwick, a distinguished Federalist of national reputation and services, and a jurist of excellent ability and repute. The succession naturally would have fallen to him; but two of his associates, Isaac Parker and Samuel Sewell, convinced that a reform in the administration of justice could be accomplished only by a new man, suggested to the Governor that Parsons be appointed. They also urged that the appointment be made at once as a surprise, promising their co-operation in securing an acceptance. This advice was followed.

The appointment was received by the public with great satisfaction⁵⁴ though with some doubt of its acceptance. It was not realized how strong a summons to duty it presented. Parsons knew well the disgraceful condition of the courts, and felt within

⁵⁴ 10 Massachusetts Reports, 528.

him the desire and the power to reform it. This—far more than the urgent entreaty of his friends—induced him to accept. And he entered upon his task with great energy and zeal.

One important step in reform had already been taken two years before. Before that several judges of the Supreme Judicial Court would sit together in trials of issues of fact before a jury; and as the judges would charge the jury in turn, sometimes differing in the statement of the law, much confusion and error resulted. In 1804 *nisi prius* terms of this court were established, one judge sitting in each county for the trial of jury cases; and questions of law arising from such trials, or otherwise, were heard and determined by a bench of at least three judges at terms held for the purpose and called law terms.

Parsons had himself been very active in bringing about this change, and deemed it a great step in reform. It facilitated the trial of jury cases and the decision of points of law. But it did not have the general approval and co-operation of the bar; and the earnest attempt by the judges under the new system to expedite business was steadily obstructed by the unpreparedness or unwillingness of the bar. This evil the new Chief-Justice determined to abate at any cost; and his method was as novel as it was drastic and effectual. In the first place he directed the sheriffs and clerks in counties where he was about to hold *nisi prius* terms to summon jurymen enough

for three juries in place of two. Next, he insisted that all cases when reached in their order should be tried. And, finally upon the trial itself, he very much shortened the time consumed by restricting both the testimony of witnesses and the arguments of counsel. At times he seemed even to his associates upon the bench to overstep due bounds. He would not tolerate the consumption of time by an attorney in false or inapt reasoning or in empty declamation. In fact he usually required counsel, before beginning to argue to the jury, to state briefly to the court the points on which he intended to rely; and if they seemed to the court unsound or insufficient, no argument was allowed.

It was to be expected that such novel and arbitrary action should be stoutly resisted by its victims; and many amusing incidents occurred. Some of the intimate friends of the Chief-Justice felt and resisted his discipline most. Samuel Dexter, when stopped in the argument of a point upon which there was no evidence, replied: "Your Honor did not argue your own cases in the way you require us to." "Certainly not," answered the court, "but that was the judges' fault, not mine." At Worcester, Frank Blake, a leader at the bar, when directed before arguing to the jury to state his points to the court, refused, insisting on his rights to address the jury in his own way. "Certainly," said the court, "if you address them at all, you may address them in your own way, —and there can be no better; but I must first know

whether you have any case to speak about. I do not now see one; but perhaps you may point one." When, thereupon, Blake again refused, and boldly started to address the jury, the court ordered him under arrest, and proceeded to charge the jury. But as the officer advanced, about to execute the order, the Chief-Justice, stopping in the midst of his charge, said to the sheriff: "Stop, Sir, a few moments." After ending his charge, he turned to the bar and said: "Brother Blake, will you go to jail now, or wait till you have got through some of your cases?" "I think," said Blake, "if it is all one to your Honor, I will wait a little." That evening the Chief-Justice attended a supper party at Mr. Blake's house.⁵⁵

He steadily pursued this course, but always without fear or favor and with an unruffled temper. His wife, who occasionally accompanied him on his circuits, wrote the children of one such trip: ⁵⁶

Your father sent out yesterday for the third jury. The bar make themselves very merry now about it, and say he drives them tandem. There was a great deal of business to be done at first, but it sinks fast under your father's hands.

For most judges such a method would be both unsafe and unjust. But he was almost infallible. His command of legal principles was so ready and complete, his insight so quick and true, and his reasoning so rapid and logical that he saw and

⁵⁵ Memoir, p. 209.

⁵⁶ Memoir, p. 211.

grasped the truth, as it were, almost at a glance. Being sure of himself he would occasionally override the individual for the speedy attainment of justice and the public welfare. He succeeded, and accomplished a great reform. The docket was cleared. Trials became regular. Decisions were prompt. And all were pleased, except a few lawyers, for even the parties who lost their cases reached at last the end of their litigation.

It was not alone in the reformation of legal procedure and administration that Parsons was original and effective. He was equally so in the settlement and development of the substantive law. His great contributions to constitutional law have already been described. Shortly before ascending the bench he prepared for Chief-Justice Dana the new Statute of Distributions which was soon afterward enacted by the Legislature. "He was the first," says Justice Story, "to introduce into our practice the 'writ of right,' and the whole body of the law incidental to it. Commercial law was little known in his day, but toward the close of his life it began to be studied. He mastered it."⁵⁷ In his decisions as chief-justice are found, clearly and concisely stated, the common law in relation to real estate and to commercial and marine contracts, as well as a lucid explanation of the law merchant.⁵⁸ In his varied and important ex-

⁵⁷ Report of Lecture before Harvard Law School. Law Reporter, vol. IX, 289.

⁵⁸ 10 Massachusetts Reports, 528.

perience of over thirty years at the bar he had become familiar with the course and usages of trade and commerce and with New England life in its varied domestic, religious, social, and political aspects; and combining these commercial usages and popular customs with the fundamental principles of the English common law, he determined and stated, with great originality, boldness, and wisdom, a common law of New England that has had a strong and beneficent influence in the development of law throughout the United States.⁵⁹

One important illustration will suffice. In 1810, in the case of *Milford vs. Worcester*,⁶⁰ the question was raised, What constitutes a valid contract of marriage in Massachusetts? The facts were these: A man and a woman requested a justice of the peace to unite them in the bond of matrimony; and when he refused, they attempted to marry themselves, by stating in his presence, the one to the other, that they took one another to be husband and wife. Thereafter they lived together. The year before, in New York, Chancellor Kent, in a *dictum*, had declared that no formal solemnization of marriage was requisite. "A contract of marriage made *per verba de presenti* amounts to an actual marriage, and it is as valid as if made *in facie ecclesiae*."⁶¹

This conclusion was based on two premises. One

⁵⁹ Morison, *Life of Jeremiah Smith*, p. 428.

⁶⁰ 7 Massachusetts Reports, 48.

⁶¹ *Fenton vs. Reed*, 4 Johnson's Reports, 52.

was that the mediæval canon law of the European Continent, which required only the consent of the parties to constitute marriage, had been imported into the common law of England, and thence, carried by the early colonists, had passed to America and become a part of the common law of the United States. And the second premise was that this common law had not been abrogated or superseded by the acts of the legislature, requiring formalities, because those acts had not declared in express terms that a marriage celebrated without such formalities and by the mere consent of the parties was void.

This doctrine—that mere consent makes marriage—was reiterated and elaborated by its author in 1826 in his *Commentaries*.⁶² It was approved in 1842 by Professor Simon Greenleaf of the Harvard Law School in his treatise on the law of evidence.⁶³ With such prestige, it was gradually affirmed by the highest courts, and became the settled law of many of the states; so that in a large part of the United States, to constitute a valid marriage, no officer, no formalities, no witness, but only the consent of the parties, was necessary. Obviously such a doctrine introduced great uncertainty into the marriage contract, and involved great danger to the dignity and security of family life.

Fortunately Chief-Justice Parsons took a radically different view. He denied both premises. "When

⁶² *Commentaries*, vol. II, 86.

⁶³ Greenleaf on Evidence, par. 460.

our ancestors left England," he declared, "and ever since, it is well known that a lawful marriage there must be celebrated before a clergyman in orders." And reviewing the successive legislative enactments, including the Statute of 1786 then in force, he concluded:

When, therefore, the statute enacts that no person but a justice or a minister shall solemnize a marriage, and that only in certain cases, the parties are themselves prohibited from solemnizing their own marriages by any form of engagement, or in the presence of any witnesses whatever . . . the mutual engagement of the parties in this case, to take each other for husband and wife, in the room where a justice was present, he not assenting, but refusing to solemnize the marriage, is not a lawful marriage.

The principle—that to constitute marriage a ceremony before some duly authorized officer, civil or religious, is necessary—thus settled in Massachusetts, has since then been followed in several other states, and has done much to conserve the family as a foundation of society. Already a reaction has begun. Even New York—the first state to adopt the Kent doctrine—has discarded it. In 1901 it was there enacted that the consent of the parties, to constitute marriage, in the absence of any legal official, must be embodied into a written contract, duly signed and acknowledged by the parties and by two witnesses.⁸⁴

The decisions of Parsons as chief-justice, which begin in the second and end in the tenth volume of the Massachusetts Reports, are usually brief. Like

⁸⁴ Laws of New York for 1901, chap. 339.

those of John Marshall, they contain comparatively few citations; and one reason is obvious: but few reports had yet been published in America. Not until 1804—two years before Parsons ascended the bench—did the legislature of Massachusetts authorize the appointment of a reporter, by his personal attendance, and by any other means in his power, to obtain and publish true and authentic reports of the decisions of the Supreme Judicial Court.⁶⁵ Much of the work of the court, therefore, was elementary. Not even its pleading and practice were yet clearly defined and settled. It is all the more to his credit, then, that in his seven years upon the bench he contributed so much that has proved of permanent value in the history and development of the law.

And yet perhaps this was to be expected from his unique equipment as a judge. He had to an eminent degree the judicial mind and method. No one has described this characteristic so well as did his successor, Chief-Justice Parker, in an address to the grand jury in 1813 about a month after Parsons's death:⁶⁶

He was a patient and diligent inquirer after truth. . . . The remarkable coincidence of opinion, which appears in our reports, is not more a testimony of his power of enforcing his own, than of his candid estimation of that of others. He was not an arrogant man. . . . The decisions of the Court, with the reasons on which they were founded, when digested and committed to writing by him, were submitted to the consideration of

⁶⁵ Acts of 1804, March 8.

⁶⁶ 10 Massachusetts Reports, 522.

his brethren . . . and he lent a willing ear to the suggestions of alteration and improvement.

A longer life could not have increased his fame as a lawyer. His contemporaries commonly called him "the giant of the law." His great competitor, James Sullivan, declared him to be the greatest lawyer then living.⁶⁷ He had "for more than thirty years," declared his successor, "been acknowledged the great man of his time."⁶⁸ But a longer career on the bench might have given the scope he deserved for his fame and service as a judge. Justice Story said:⁶⁹

Had he sat upon the bench twenty years he would have left behind him a reputation as great and extensive throughout the whole country, and to posterity, as it was in his own State, and among his contemporaries. He might have become the great judge of the age. . . . His vast learning, his power in argument, his solid and over-matching understanding placed him above all his contemporaries.

After all, the public respect and esteem that he enjoyed were based on the purity and elevation of his character. It is but an instance, though a significant one, that he would never accept a fee from a widow or from a minister.⁷⁰ His whole career was dominated by his sense of duty. And when he came to its close his thoughts were not upon his cherished

⁶⁷ 10 Massachusetts Reports, 524.

⁶⁸ 10 Massachusetts Reports, 522.

⁶⁹ Law Reporter, vol. IX, 289.

⁷⁰ Memoir, p. 181.

studies in the classics, mathematics and astronomy, but upon his professional duties to which he had ever been faithful. His last words were:⁷¹

Gentlemen of the Jury, the case is closed, and in your hands. You will please retire and agree upon a verdict.

⁷¹ Memoir, p. 354.

ZEPHANIAH SWIFT.

ZEPHANIAH SWIFT.*

1759-1823.

BY

SIMEON E. BALDWIN,

Chief-Justice of Connecticut.

TO ZEPHANIAH SWIFT, more than to any other man, Connecticut owes her simple and orderly system of private law.

He was born on February 27, 1759, at Wareham, Massachusetts, where his parents then lived. In his early childhood they removed to Lebanon, Connecticut, then one of the more important towns in the state, standing seventh in population and eighth in wealth. Here at this time was one of the best schools in New England, established in 1743 by Governor Jonathan Trumbull, and then kept by a native of the place, Nathan Tisdale, a graduate of Harvard, of the class of 1749. The original plan of the academy was that not more than thirty scholars should be received, but the attendance grew to seventy or eighty, boys being sent to it from as far south as Georgia and the Carolinas, and some from the West India islands. At one time nine out of the thirteen colonies were represented among the students. There were no vacations, and Mr. Tisdale had the

*An extended and careful investigation has failed to locate an authentic portrait of the subject of this essay.—Ed.

art of pressing the brighter scholars forward so that some attained a considerable knowledge of Greek and Latin at an age when the modern child is hardly out of the kindergarten.¹ In the Autumn of 1773 his place was temporarily taken by John Trumbull, afterwards a distinguished artist, and then just out of Harvard.²

In 1774 young Swift, at the age of fifteen, entered Yale College. He found himself at once in a circle of youths, many of whom were to play a leading part in the history of their times.

Noah Webster, who made the American language, so far as anything in it differs from the English, was one. A second was Oliver Wolcott, Hamilton's successor as secretary of the treasury, and who later led in the long struggle which placed the Toleration party in power in Connecticut and gave it the constitution under which it is still governed. Joel Barlow was a third, "the grandfather of American poetry," who contributed extensively and effectively to the political literature of England, France, and America. President Madison in 1811 nominated two members of this class to the highest offices in his gift: Barlow as minister to France, and Alexander Wolcott, (of Litchfield, Connecticut), as associate-justice of the Supreme Court of the United States. Barlow's nomination was confirmed. Wolcott's was

¹ Bernard C. Steiner, *History of Education in Connecticut*, p. 34; John Trumbull, *Reminiscences of his Own Times*, pp. 49, 15.

² Bernard C. Steiner, *History of Education in Connecticut*, p. 34; John Trumbull, *Reminiscences of his Own Times*, p. 15.

rejected by the decisive vote of 24 to 9,³ the place being filled later, and better, by the appointment of Joseph Story. Another of the class was Uriah Tracy, who twenty years later was to be a colleague of Swift in the national House of Representatives, leaving it in 1796 to spend the rest of his life as one of the Federalist leaders in the Senate. Another was Josiah Meigs, afterwards professor of mathematics and natural philosophy at Yale, president of the University of Georgia and commissioner of the General Land Office of the United States. Meigs became a prominent Jeffersonian as political parties developed, and so did another of this class, Abraham Bishop, of New Haven, whose political addresses and writings reflected the spirit of the French Jacobins of the day more distinctly than those of any other New England pamphleteer.⁴

It was well that young Swift was thus thrown among comrades of decided promise, for the instruction he was to receive and the discipline to which he was to be subjected were by no means of the best. He entered Yale during a long interregnum throughout which, it was without a president. The professor of divinity acted as president, and had few qualifications for it. One of the tutors, however, during most of Swift's college life, was a born leader of men,—Timothy Dwight, who twenty years later be-

³ H. Adams, *History of the United States*, vol. I, 360.

⁴ See *Proceedings of the Massachusetts Historical Society*, Second Series, vol. XIX.

came president of the College. The regular curriculum of study was a limited one, but Dwight was allowed, by vote of the College corporation passed in 1776, to give to seniors who were willing to make a payment to him for it, in addition to the tuition fees due to the College, instruction in rhetoric, history, and *belles-lettres*.⁵

In 1777 the College was closed for some months in consequence of the disturbances incident to the Revolutionary War; but by the ensuing summer a brighter day dawned, and the presidency so long vacant was supplied by the election of Reverend Ezra Stiles, D. D., who at once took up the work of instruction. On July 1, 1778, he notes in his *Literary Diary*⁶ that the seniors discussed before him the question, "Whether the Destruction of the Alexandrine library and the Ignorance of the Middle Ages, caused by the Inundation of the Goths and Vandals were Events unfortunate to Literature." "They disputed," he writes, "inimitably well; particularly Barlow, Swift, Webster, Gilbert, Meigs, Sage, &c." Gilbert and Sage were both afterwards members of the lower house of Congress.

The Commencement appointments indicate that Swift was not one of the first scholars in his class, but he took part in an English "disputation," which occupied half an hour of the public exercises when his class were presented to the President for their

⁵ The Yale Book, vol. I, 99.

⁶ Vol. II, 288.

degrees; the other disputants being Wolcott and Smith.

Swift engaged upon his graduation in the study of law, and on his admission to the bar opened an office in Mansfield, Connecticut, from which he soon removed to the larger town of Windham in the same county. Here he remained throughout his life.

There were then no cities in Connecticut. Among her leading ministers, lawyers, or physicians were to be found many in towns which now, by division and emigration, have a population of but one or two thousand. Windham has come to include a manufacturing city of nine thousand inhabitants, but it bears another name, and is three miles from the ancient village center where Judge Swift for forty years had his office and his home. It was the original county seat, and a station on one of the main stage-roads in the North. The county newspaper, the *Windham Herald*, was printed there, to which Swift became an occasional contributor. Its population in 1775 was 3528.

The American Revolution and the French Revolution unsettled the foundations of thought throughout the United States. The ties of Church and State were everywhere relaxed. In Connecticut they had been particularly close. The clergy of the established church (which was Congregational) resisted any substantial reduction of its privileges. They had also a fortress of refuge, peculiarly their own. The corporation of Yale College was composed of a

President and ten Fellows, but the Fellows elected both the President and their own successors, and all the Presidents and Fellows had always been Congregational clergymen. Here were being trained up in each generation the men who were to govern the commonwealth in the next. What reform could be expected by dissenters from the establishment as the fruit of training under such auspices? While Swift was in college, questions of this character were agitating the people. The General Assembly had withdrawn its patronage of the institution, but was willing to renew it, if provision were made for introducing a lay element into the composition of the corporation. During Swift's senior year, active negotiations between the State and College authorities were carried on with that object in view, but without effect.⁷ The struggle was to continue fourteen years longer, and before it was settled by a judicious compromise, carried out by legislation in 1792, Swift was to become one of the leaders of the party of reform.

He was elected to the House of Representatives as one of the two members from Windham in 1787; having held up to that time no office of importance, other than that of captain of a militia company. The General Assembly then met semi-annually; and he represented Windham at one or both of these sessions until 1793, being also clerk of the lower house in 1792.

⁷ Papers of the New Haven Colony Historical Society, vol. III, 422.

During this period he was one of a set of about a dozen men who acted together in promoting what was called at the time the "liberal" movement. They became known as the "*stelligeri*" and were said to have associated themselves as a secret society.⁸ Some of them, such as Pierpont Edwards, William Judd, and Jonathan Ingersoll, became in later life leaders of the Toleration party: others, of whom Swift was one, adhered steadily to the Federalists. All were determined to secure a share for the State in the government of the college and they succeeded in the undertaking. It may be well imagined that their political opponents looked on them as enemies of public order and settled government.

Mr. Swift also became, at this stage in his life, prominent in a church controversy which agitated the people of his county. One of the local churches desired to secure a young Harvard graduate, Reverend Oliver Dodge, of the class of 1788, as their pastor. The retiring pastor, under the provisions of the "Saybrook Platform" had the power of dissolving church meetings, and used it to prevent the tender of a "call" to Mr. Dodge. Swift denounced the act as fit only for a tyrannical government. A wordy warfare in the newspapers ensued. Some of the neighboring clergy took part in it. Pamphlets were published on both sides. Personal feeling ran high. Swift, in censuring the attacks on Mr. Dodge, wrote in the Windham Herald, that to state them

⁸ Stiles, Literary Diary, vol. III, 451, 454, 465.

would be to "unfold a story that will blacken the pages of infamy itself."⁹ As the controversy thickened, his publications, mainly anonymous, became vituperative, and really scurrilous. Anonymous replies were of the same character. One of the clergy in a neighboring town described him in print *inter alia* as destitute of delicacy, decency, good manners, sound judgment, honesty, manhood, and humanity; a poltroon, a cat's paw, the infamous tool of a party, a partisan; a political weathercock, and a "rag-a-muffin."¹⁰

Swift certainly lost his head in this battle with the church, although he wrote as a follower of Christ, desirous only to strip his gospel of the conventional additions of ecclesiasticism, and show it divine in form, as it originally stood.¹¹ But he was a born reformer, and had the impetuosity and daring that it takes to be one, which are not always moderated in youth by sober judgment and discretion. There were real evils to be fought. His training and profession made law and government his particular field of study. He found the government of his State hampered by a religious establishment, and he rightly shrank from no danger of per-

⁹ "The Correspondent," etc., Windham, 1793, p. 37.

¹⁰ Larned, History of Windham County, vol. II, 275. See an anonymous pamphlet (written by Reverend Moses C. Welch, D. D.) entitled "The Addresser Addressed, or a Letter to the Correspondent; containing some free remarks on his Address to the Reverend Moses C. Welch. Humbly dedicated to the Hon. Zephaniah Swift, Esq.," 1796.

¹¹ "The Correspondent," p. 119.

sonal reproach in endeavoring to part what he believed never should have been joined. His error was in not giving due credit for integrity of motive to those from whom he differed, and in too often substituting abuse for argument.

He found also the government both of his State and of his country in some sort of alliance with the institution of slavery, and set his face from the first against that. An act looking to the abolition of slavery in Connecticut had been passed in 1784. This made the children thereafter born of slave parents free when they reached the age of twenty-five. Voluntary emancipation of slaves was, however, still discouraged. The owner, and in case of his subsequent death his estate, remained liable for their support, unless they had been set free with the consent of the selectmen of the town. This consent was to be given only if they, on due inquiry, should "be of opinion that it is likely to be consistent with the real advantage of such servant or slave, and that it is probable that the servant or slave will be able to support his or her own person, and he or she is of good and peaceable life and conversation."¹²

Mr. Swift, who was an active member of the Connecticut Society for the Promotion of Freedom, and for the Relief of Persons Unlawfully Holden in Bondage, delivered in 1791, at Hartford, an address before the Society, dwelling on the encouragement which it might derive from the spread of the doc-

¹² Connecticut Statute, Edition 1810, p. 624.

trine of human liberty from America to France. The address was soon afterwards published under the title of an Oration on Domestic Slavery. This no doubt was one of the causes which led to the enactment in Connecticut next year of a statute to encourage emancipation, by relieving the former owner from liability to support the freedman if the latter were set free by his own wish, and was in good health, and of middle age.¹³ In 1794 a bill was passed by the House of Representatives in the State to abolish slavery, but failed to receive the assent of the upper house.¹⁴

The ecclesiastical constitution and the slave laws of Connecticut were not the only things in her system of government, in which Swift thought her behind the age. He found much to criticise (as well as to admire) in her judicial system, and his views in regard to that soon began to take definite shape and seek public expression.

Meanwhile he was called to take part in the affairs of the nation.

The census of 1790 showed that Connecticut had attained a population of 240,000 and the number of her representatives in Congress was increased in 1792 from five, as temporarily provided in the Constitution of the United States, to seven, by the adoption of the rule that to each state one representative

¹³ Connecticut Statutes, ed. 1810, p. 625.

¹⁴ Minutes of the Proceedings of the Second Convention of Delegates from the Abolition Societies, in 1795, pp. 3, 17.

should be allowed for every thirty thousand inhabitants. The mode of election then pursued in Connecticut, both as respects the members of the upper house of the General Assembly and of the lower house of Congress was a peculiar one. The freemen in each town, at a general town meeting held in the spring, proposed for nomination twice as many persons as were to be elected. The General Assembly canvassed the returns from all the towns, and those, not exceeding the prescribed number, who received the greatest number of notes, were declared to be the nominees. At another town meeting, held in the fall, the freemen of each town voted for not more than half of those upon this official nomination list, and the half who received the most votes in the entire state were declared elected. This scheme gave the widest possible range of choice so far as locality was concerned. It gave a very limited range of choice, when it came to the final act of election, as regards the number from whom to select. No vote for one not on the nomination list could be received. A majority of the votes cast was not required for the election of any particular member. If out of forty thousand votes a man received a hundred, he might be elected, if no one received more, except those who might be elected by a larger vote. The General Assembly also arranged the nomination lists so that those whom they wished to favor stood first. Naturally those whose names occupied this place were likely to receive the most votes, many voters not taking the

trouble to read the entire list, and so the party in power perpetuated its existence.¹⁵

The Toleration party put Swift forward as one of the nominees for the two new seats in Congress, under the Act of 1792, and on November 25 of that year, to the dismay of the Church and State party, he was elected,—the first man sent to the House of Representatives from the northeastern portion of the State.

The third Congress was the first in which the opposition to the administration had returned a majority. Swift acted with the Federalists.

When Giles of Virginia, in March, 1794, came forward as the spokesman of the opposition, in advocacy of the sequestration of all debts due from our citizens to British subjects, to secure the indemnification of our people for losses incurred by British violations of neutral rights, Swift was the first to reply. Such action, he maintained, would be plainly contrary to the law of nations, not only because no direct diplomatic negotiations for redress had yet been initiated, but because all debts were contracted under a sanction of public faith and an understanding that a war should not render them liable to confiscation.

A new measure was then proposed, that of a prohibition of all importation of British goods, until justice should be done by the British government.

¹⁵ The Early History of the Ballot in Connecticut, Papers of the American Historical Association, vol. IV, 407.

Swift opposed this on similar grounds. The resources of diplomacy should be exhausted first. He wished that this republic might establish and act upon a principle calculated to bring national disputes to an amicable accommodation and prevent the calamities of war. It was said that the proposition was supported by popular opinion. The legislators of the Union ought to guard against all popular influence as being of the most dangerous tendency. There was no danger to be apprehended from the Government. The only danger that existed was from the encroachments of the people on the Government, and if the Government ever falls, it will be from the too great prevalence of a local popular influence, which does not speak the general sense of all the community. The gentleman who had originally proposed a resort to sequestration was now supporting this scheme for a prohibition of commercial intercourse because, as he said, it was a stepping-stone to that. If so, he, for one, should step on this stone with horror and indignation. He should consider it to be the step-stone to the temple of infamy, wretchedness, and ruin.

Washington succeeded in parrying the efforts of the opposition to pass the measures which have been described, by sending off Chief-Justice Jay as a special envoy to Great Britain, whose efforts resulted in the treaty of November 19, 1794. An English statesman, Lord Sheffield, some years afterwards called it a most impolitic treaty, in which Lord

Grenville was "perfectly duped by Jay." In the United States it was, from the first, denounced by the Republicans as a disgraceful surrender to Great Britain of rights dearly won by the struggles of the Revolution. To an attack upon it of this nature by Nicholas, of Virginia, made in 1796, in the debate in the House on a resolution to carry the treaty into effect, Swift made the reply in behalf of the Administration. A treaty, he said, was declared by the Constitution to be the supreme law. It consequently abrogated all prior legislation to the contrary, except so far as contracts had been made which were dependent upon them. A contract cannot be repealed. But a treaty was a contract, as well as a law. It plighted the national faith. If appropriations of money were required to fulfill obligations which it created, it became the absolute duty of Congress to make them. The gentleman from Virginia had declared that \$15,000,000 might be required to pay the debts which we had assumed by the treaty. Be it so. Let the sum be ever so great, if the debts were just, they ought to be paid. It had been argued that the treaty gave no promise of justice to American sufferers by British spoliation. Their claims were to be submitted to five special commissioners of whom two must be and a third might be named by Great Britain. What then? He would not have so unfavorable an opinion of his countrymen or of British subjects as to believe that they would judge only in favor of their own nation. He

trusted they would decide upon the broad basis of principle and not upon the narrow one of country. Swift also reviewed the leading provisions of the treaty upon their merits, and maintained with vigor that it was a fair and honorable settlement of long-pending controversies over matters as to which neither nation had been without just charge of fault.

His last speech, while a member of the House, was made in January, 1797. The committee of ways and means had recommended certain direct taxes, to be apportioned between the states "according to the last census." He moved and Madison seconded an amendment providing for an apportionment "according to their numbers." In the seven years since the census of 1790, he said, some states had gained slightly and others greatly in population. In Connecticut, for instance, there was an increase of but 10,000 inhabitants: those of New York had doubled. Yet the bill proposed would throw \$98,000 on Connecticut and only \$140,000 on New York. If there were power to take a new census within any of the decennial periods prescribed by the Constitution, such an enumeration would put the apportionment on a just foundation: if there were not, the amendment could do no harm. An animated debate ensued, but the amendment was—very properly—voted down by a large majority.

While Swift was in Congress, he published what was the first attempt made in this country to set

forth the laws obtaining in any American state, in systematic order. This work, entitled a System of the Laws of the State of Connecticut was printed in Windham; the first volume in 1795 and the second in 1796. A considerable part of it had been written there before 1793. It was published by subscription, as was usual in those days, and the list of subscribers numbered several hundred. It was headed by the President and Vice-President, and comprised persons in every state in the Union, including most of the senators and representatives, together with one from the Southwest Territory.

Connecticut, in her early days, had not accepted the common law of England as of inherent authority within her borders. So far as her own legislation extended, it was, as she claimed, final, and her bill of rights protected the individual against the public when, and only when, the act complained of could not be justified either by that, "or in the case of the Defect of such Law in any particular Case, by some clear and plain rule Warranted by the Word of God."¹⁶ The unwritten common law of England was entitled to respect as an expression of what was right and reasonable, so far as it might appear to the people and courts of the Colony, and no farther.¹⁷

This position was maintained, with general consistency, until the enactment by Parliament of the

¹⁶ Statute of Connecticut, Rev. of 1702; vol. I; ed. of 1750, vol. I.

¹⁷ Root's Reports, I, Introduction, xliii.

various measures which were the proximate cause of the Revolution. Then it became the interest of her people to assert that by the common law of England of a public character they had certain rights, chief of which were immunity from taxation and the privilege of trial by a jury of the vicinage.¹⁸ By that time, also, the insufficiency of the colony statutes and the Bible to serve as the only authentic sources of private law had become more apparent. Many of the provisions of the Mosaic law were seen to be quite inapplicable to the conditions of American society. The written law of the Colony could not expand with a rapidity proportioned to the steady increase of wealth and population, by means of legislation alone. Judicial precedents, for want of any published reports of them, were but an uncertain aid. The courts thus found themselves gradually driven to accept unwritten rules of the English common law regarding private rights and relations, as principles of decision, without stopping in each case to inquire how far these rules were intrinsically reasonable. Considerations of this nature led to dropping the statutory provision above quoted, from the first revision of the new-born state of Connecticut, published in 1784.

Two schools of lawyers soon arose. One clung as closely as seemed possible to the ideas of former days. America was for Americans. Their efforts should be, as one of them expressed it, "to rear a sys-

¹⁸ Baldwin, *The American Judiciary*, p. 2.

tem of jurisprudence purely American, without any marks of servility to foreign powers or states.”¹⁹ The other school was for resorting freely to English precedents, and accepting whatever rules were established by them, unless they were pronounced by the courts to be inconsistent with the existing conditions of American society.

Swift in his “System” adhered to the first school. “The English common law,” he there said, “had never been considered to be more obligatory than the Roman law has been in England.”²⁰ As he grew older and wiser, he became identified with the second school, which soon gained ascendancy in the courts.²¹

His treatise contained some preliminary chapters on civil government and law in general which show that he had read somewhat widely and could think for himself. The Institutes, Code, and Novels of Justinian are repeatedly quoted as a source of authority. References are made to the works of Montesquieu and Domat, and in arguing against a pure democracy he quotes from the “Henriade” of Voltaire the lines

*Et fit aimer son joug à l'Anglais indompté
Qui ne peut ni servir, ni vivre en liberté.*

¹⁹ 1 Root's Reports, Introduction, xiv; Smith and Ingersoll, argument, 3 Day's Reports, 166.

²⁰ System, vol. I, 44.

²¹ Fitch vs. Brainerd, 2 Day's Reports, 163, 189; Card vs. Grinman, 5 Connecticut Reports, 166, 168; Swift's Digest, vol. I, 9; Swift on Evidence, sec. 7.

The United States, he thought, had most to fear from popular disorders, leading to anarchy. Next they might suffer from encroachments upon their power by the larger states. To prevent this, it would be well if the Constitution could be so amended as to break down all the existing states and re-divide the territory of the Union into new states of moderate and equal size or weight.²²

He asserted that no state in the Union had departed in so many points from the common law of England as had Connecticut.²³

Unquestionably legislation in this direction had gone farther in New England than in the other states, but it may be doubted if Connecticut had out-run Massachusetts. Jefferson declared that there was not one lawyer in New England, or ever could be, who was really versed in the English common law, and that therefore there were no good lawyers there.²⁴

At the time Swift wrote, and for many years later, Connecticut had no written constitution, unless it were the charter which she had received from Charles II. The judiciary, therefore, in his opinion, had no power to declare a statute unconstitutional and void. As to that the legislature was their master, not their servant.²⁵

²² System, vol. I, 33.

²³ Id., 43.

²⁴ Writings, Thomas Jefferson Memorial Association, vol. XII, 425, 429.

²⁵ System, vol. I, 52, 53, 56.

He was, however, outspoken in denouncing the frequent exercise by the General Assembly of the power of granting new trials, setting aside judgments, and interfering in special cases of assumed hardship with the operation of general laws.²⁶

In the same spirit he attacked the system then prevailing, of appointing all judges annually by vote of the General Assembly: ²⁷

In this state it is apparent that where a case comes before the superior court, for trial between an influential character, who is usually a member of the legislature, and a poor man without influence, the judges have not that independence of situation, which is necessary to enable them to form an impartial decision. There is danger of the operation of a bias on their minds, to which they ought not to be exposed by the nature of their appointments. As they can have no inducement to extend their power, let them be independent, and they have no inducement to swerve from justice. They ought to be appointed during good behaviour, and removable on impeachment for corruption, and misbehaviour.

He did not fail to comment with approbation on the gradual liberation of Connecticut from the fetters of ecclesiasticism: ²⁸

Mankind are rejecting the false appendages of religion, which have so long imposed upon them penances and restraints, that have only contributed to increase their wretchedness and misery. They begin to entertain an idea, that religion was not instituted for the purpose of rendering them miserable, but happy, and that the

²⁶ System, vol. I, 76, 78.

²⁷ System, vol. I, 94.

²⁸ System, vol. I, 145.

innocent enjoyments of life, are not repugnant to the will of a benevolent God. They believe there is more merit in acting right, than in thinking right; and that the condition of men in a future state, will not be dependent on the speculative opinions, they may have adopted in the present.

He spoke with great pride of the public schools of his state: ²⁹

Quintilian, Milton, Locke, and Rousseau, employed their sublime talents, in sketching plans for the education of youth: but these were calculated for those who had wealth and leisure to devote their whole time to the pursuit. They did not contemplate the idea of general education. This honour has been reserved for the State of Connecticut, and some of the other States in New England. In no other country, has the legislature established, and provided for a system of education, that is calculated to diffuse to all classes of the people that general information which they are capable of acquiring, without interfering with that portion of labour which is necessary to obtain a subsistence. . . . I feel a pride to think that my country has been enriched by such a noble discovery. I feel an enthusiasm to communicate it to the world, for the purpose of extending happiness to the whole human race.

He saw and deplored the existing difficulties in the way of free naturalization: ³⁰

The doctrine of perpetual allegiance, is the law of the United States. This principle seems to be restrictive of that natural right, which every person has to remove himself to whatever country he pleases, and to join himself to such society of men, as he may choose. It would be an act of justice, as well as humanity, if

²⁹ System, vol. I, 157, 160.

³⁰ System, vol. I, 164, 165.

nations could agree upon a certain mode by which the subject of a government could be discharged from allegiance to it, and owe that obligation only to the country to which he had removed, and where he had settled for life. But until nations will generally agree upon some uniform plan, it would be improper for any particular nation, to subject themselves to the disadvantage of establishing a rule by which their own subjects, on abandoning their country, might be discharged of their natural allegiance, when the subjects of other governments joining them, would not be entitled to a reciprocal privilege.

Connecticut was still a slave state. He refers to slavery as a practice which has long been a dishonor to human nature,³¹ and is also repugnant to the dictates of sound policy; and yet, he observes, those who are still slaves in Connecticut are in general much happier than those who have obtained a liberty, which they know not how to use as not abusing it.³²

When Swift wrote it was not considered proper for the court in any case to give instructions to the jury as to the law. He was opposed to this absurd limitation, and he earnestly argued in favor of granting judges the power.³³

He expressed himself strongly in favor of softening the criminal laws of the state, by making prisons more comfortable, in which Pennsylvania had then recently led the way, and also by lessening the number of offences punishable by death. Rape he would

³¹ System, vol. I, 220.

³² System, vol. II, 350.

³³ System, vol. II, 259.

have struck out of the list, and makes this reference to a substitution of another penalty:³⁴

In this State, not many years since, a man convicted of a rape, and sentenced to suffer death, petitioned the legislature for a commutation of his punishment, even to castration. The legislature granted his request, and the criminal underwent an operation, which effectually guards against a repetition of the offence, and would be a very proper punishment in all cases, were it not for the ridicule attending it.

In treating of offences against religion, he improved the opportunity to re-state the views which he had long entertained and for which, or perhaps from a misunderstanding of which, he had incurred much censure. He followed Beccaria in approving the rules, *Deorum offensa, curæ diis*:³⁵

The being of a God is so universally impressed on the human mind, that it seems unnecessary to guard against a denial of it by human laws. Atheism is too cold and comfortless, to be a subject of popular belief. . . . To prohibit the open, public, and explicit denial of the popular religion of a country, is a necessary measure to preserve the tranquillity of a government. Of this no person in a Christian country can complain, for admitting him to be an infidel, he must acknowledge, that no benefit can be derived from the subversion of a religion which enforces the best system of morality, and inculcates the divine doctrine of doing justly, loving mercy, and walking humbly with God. In this view of the subject, we cannot sufficiently reprobate the baseness of Thomas Paine, in his attack on Christianity, by publishing his

³⁴ System, vol. II, 294, 309, 310; Paper on Whipping and Castration as Punishment for Crime, Yale Law Journal, vol. VIII, 371.

³⁵ System, vol. II, 322, 323, 324.

Age of Reason. While experiencing in a prison his visionary theories of government, he undertakes to disturb the world by his religious opinions. He has the impudence and effrontery, to address to the citizens of the United States of America, a paltry performance, which is intended to shake their faith in the religion of their fathers; a religion, which, while it inculcates the practice of moral virtue, contributes to smooth the thorny road of this life, by opening the prospect of a future and better: and all this he does, not to make them happier, or to introduce a better religion, but to imbitter their days by the cheerless and dreary visions of unbelief. No language can describe the wickedness of the man, who will attempt to subvert a religion which is a source of comfort and consolation to its votaries, merely for the purpose of eradicating all sentiments of religion.

The vehemence of this attack on Paine was partly due, no doubt, to the fact that the "Age of Reason" was published in 1795 and, as one of the new books of the day, was then particularly engaging public attention.

In the trial of criminal causes, it was his opinion that the public prosecutor should be guided by the principle that the state desires no verdict not expressing the fair and deliberate conviction of the jury. He says:³⁶

He should display no marks of zeal or passion. He should not attempt to warm the feelings, or prejudice the minds of the jury, by any pathetic descriptions, or artful misrepresentations. He should address himself to the understanding of the triers, and by a fair investigation of facts and an ingenious discussion of points of law, open the way to the discovery of truth and justice. Such

³⁶ System, vol. II, 401.

a line of conduct would reflect the highest honour on the candour and sensibility of a public officer. But when we see the prosecution of a criminal managed with a passionate vehemence, and the argument a compound of pompous declamation, and affected pathos, we detest the prosecutor as a blood-thirsty savage, and unfeeling monster.

This brief sketch of Swift's first work will indicate the general spirit in which it was composed. He was an enthusiast and spoke like one. He was a reformer, and accepted no institution as right because it was ancient and established, if to him it seemed wrong. The book, as a whole, had great merits, and is still often cited in the Connecticut courts.⁸⁷

Mr. Swift declined a re-election to Congress upon the expiration of his second term in the spring of 1797. In October of that year he was sent from Windham to the house of representatives in the General Assembly and chosen speaker, and at the May session, 1798, filled both these positions again.

While in Congress he had had some votes for a place on the nomination list for members of the upper house, or Council, of the General Assembly. Of those who were included in it in that of 1794, the person who had received the fewest, an old-time Federalist and signer of the Declaration of Independence, William Williams, obtained 1998 votes. For Mr. Swift only 199 had been cast.⁸⁸ His services in Congress, capped by those as speaker of the

⁸⁷ See Gould vs. Gould, 78 Connecticut Reports, 242; 61 Atlantic Reporter, 604.

⁸⁸ Stiles, Literary Diary, vol. III, 545.

House, and the merits of his book, had greatly raised his reputation throughout the state, and in the fall of 1798 he gained at last a place upon the list and was elected by the people in the following spring.

The Council numbered only twelve, but there were eighty-five for whose nomination to it a hundred votes or more had been cast in 1794. Forty of these were lawyers, and President Stiles described the whole list thus:³⁹

Of these forty about one-third decided Revelationists, one-third said to be decided Deists, the other third doubtful. Of 85 about 30 religious Characters, the rest Gallios in Religion, as some maliciously say. Certainly too many of dubious and undecided Characters for Virtue & Religion.

Swift was generally counted among the deists, and we find him occasionally styled a "free-thinker." At a day when it was a marked thing in Connecticut for any man not to attend public religious services regularly every Sunday, he was seldom seen at church.⁴⁰

In February, 1799, President Adams appointed Chief-Justice Ellsworth, Patrick Henry, and William Vans Murray as envoys extraordinary to the republic of France to negotiate a settlement of all matters of dispute, of which there were many. Governor Henry having declined, Governor Davie, of North Carolina, was appointed to his place, and

³⁹ Literary Diary, vol. III, 546.

⁴⁰ Larned, History of Windham County, vol. II, 223, 275.

after many delays, due to the rapidly changing conditions at Paris, and to political intrigues in our own cabinet, he set sail from Newport, with the Chief-Justice, early in November, 1800, on the frigate *United States*. Mr. Swift accompanied them in the capacity of secretary. They found on touching for news at Lisbon that the Directory had been dissolved and that Bonaparte, as first consul, had succeeded to the supreme power. He was not unwilling to conclude an amicable arrangement with the United States, hoping that it might lead to their joining in the maritime league against Great Britain, the formation of which was one of his favorite plans. After landing near Corunna, in Spain, the envoys proceeded overland to Burgos, where letters were received from Talleyrand, just restored to power, inviting them to come immediately to Paris. Their voyage had been rough, and, followed by the winter journey over bad roads in a country ill-provided with accommodations for travellers, fixed upon Ellsworth a mortal disease, which compelled him to resign his office as chief-justice, and carried him off a few years later.⁴¹ They arrived at Paris in March, and found Mr. Murray awaiting them. To Talleyrand the matters in dispute with so feeble a power as the United States seemed worthy of little attention at a time when the whole constitution of his government was in so critical a state of transformation, and passing, as he phrased it, from polygarchy to mon-

⁴¹ Gibbs, *Administrations of Washington and Adams*, vol. II, 434.

archy.⁴² Napoleon soon hurried off to cross the Alps and won the victory of Marengo, which was to give a temporary peace to Europe. By the end of June he was in Paris again, better disposed than ever to arrange some kind of accommodation with the United States, as a beginning of greater things. His brother Joseph was placed at the head of a commission, empowered to represent him in his pacific endeavors, and, as the first act in the new drama, the convention of September 30, 1800, was concluded with our envoys at Mortefontaine.⁴³

It was not what we had asked; it was not what the instructions of President Adams contemplated. Our envoys accepted it in despair, taking the risk of its rejection at Washington, but on the whole it was not unfair to either government and it was ratified by the United States during the following winter.

On the French side the burden of the negotiations at Paris fell upon Count P. L. Roederer, a member of the Institute of France and a versatile publicist, on whom Joseph Bonaparte particularly relied. On the American side it rested for the details, on Murray; for the general positions taken on Ellsworth. At the conferences between the French plenipotentiaries and our envoys the French language was used, of which Ellsworth and Davie were by no means masters.⁴⁴

⁴² *Memoirs of Talleyrand*, Putnam's Ed., vol. I, 207, 208.

⁴³ *Memoirs of Talleyrand*, Putnam's Ed., vol. I, 213.

⁴⁴ *American State Papers*, vol. III, *Foreign Relations*, vol. II, 340, 342.

When the business was concluded, a garden *fête* was arranged in honor of the Americans, and three gold boxes provided for presentation to them, each costing forty thousand francs. At this function the first consul, after showing our envoys a number of Roman medals of gold, which had been recently dug up in France, gave a handful of them to each. They took them without question, but shortly afterwards withdrew in company with their secretary, Mr. Swift, to an embrasure furnished by a friendly window, where he was observed to speak to them with a good deal of earnestness. After a short conversation they rejoined the party about the First Consul and said that their secretary had called their attention ⁴⁵ to a provision in the constitution of the United States which forbade their acceptance of any presents from a foreign power, and that they therefore begged leave to return the medals. Napoleon declined to take them back, saying that they had no value except as relics of a free people which he wished to go to the freest people now existing upon the earth. To Count Roederer the animation of manner displayed by Mr. Swift suggested the idea that he was vexed that no medals had been given to him, but for this insinuation there was, of course, no ground. The result was that Talleyrand, then the minister of foreign affairs, who had brought with him the gold boxes, did not present them.⁴⁶

⁴⁵ Roederer's words are "*leur avait reprimé.*"

⁴⁶ *Oeuvres de Comte P. L. Roederer*, vol. III, 337, 338. Brown,

Mr. Swift's connection with the French mission gave him valuable opportunities for extending his knowledge of public law and observing the course of dealing between nations in large affairs. Besides making many new acquaintances, he renewed, at Paris, his friendship with his college classmate, Joel Barlow, who was then residing there and engaged in literary work.⁴⁷ The Chief-Justice went to England for the sake of his health soon after the convention was concluded, and Mr. Swift then spent some time in the Netherlands, where Mr. Murray was our minister-resident.

Mr. Swift had the advantage of seeing Europe at a time when great men were on the stage and great events were taking place. Few of his countrymen had then ever made a tour of the Continent; and very few had visited it under circumstances so favorable for gaining a knowledge of what is beneath the surface of public affairs.

On his return in the spring of 1801, he was re-elected to the Council, and took his seat at the May Session. At the October Session he was chosen by the General Assembly a judge of the Superior Court, and filled that office for thirteen years by an annual re-election.

The Supreme Court of Errors of Connecticut

in his *Life of Ellsworth*, questions the correctness of Roederer's account of this affair, so far as concerns the final acceptance of the medals, of the possession of which by any of the envoys nothing appears to have ever been heard in the United States.

⁴⁷ Gibbs, *Administrations of Washington and Adams*, vol. II, 432.

dates from 1784. It was originally composed of the lieutenant-governor and council, and a few years later the governor was added. Most of the members were generally lawyers and distinguished ones, but this was only because lawyers in the United States are apt to rise to positions of political influence and power. The mode of election already described was such as naturally to secure the annual re-election of all the members of the council, or as they were more commonly styled "Assistants." Between the organization of the Supreme Court of Errors and 1801, only once did an assistant who desired re-election fail to obtain it.

This made the composition of the court necessarily political in character; for the main purpose for which its members were selected was the discharge of executive or legislative functions. Abraham Bishop, a leading Republican, when Jefferson's second election to the Presidency was being celebrated at Hartford, said:

All the legislative, executive and judicial powers of government have been by the pleasure of his majesty (King Charles), tumbled into a common mass. . . . At the present moment all these powers, together with a complete control of elections, are in the hands of seven lawyers, who have gained a seat at the council board. These seven men virtually make and repeal laws as they please, appoint all the judges, plead before those judges, and constitute themselves a Supreme Court of Errors, to decide in the last resort on the laws of their own making. To crown this absurdity, they have repealed a law which prohibited them to plead before the very court of which they are judges.

The seven men to whom he thus referred were named in a foot-note to the oration, when printed:—David Daggett, Nathaniel Smith, Chauncey Goodrich, Jonathan Brace, John Allen, William Edmond, and Elizur Goodrich, all leading Federalists. Other lawyers with them on the bench, who were less obnoxious to their political opponents, were the lieutenant-governor, John Treadwell, a Doctor of Laws, and Oliver Ellsworth.

It was impossible to defend much longer the system thus arraigned at the bar of public opinion, and in 1806, the judges of the Superior Court were made, when sitting *in banc*, the Supreme Court of Errors, in place of the governor, lieutenant-governor, and the twelve assistants, of whom the “seven lawyers” had formed so large a part. Their number was increased from six to nine, and the new court was to meet once a year, alternately at Hartford and New Haven, the members doing circuit duty during the rest of the time. Each circuit was held by three judges sitting together. Ellsworth was elected the chief-judge, but declined the position.

Swift, in 1801, had been transferred from the Supreme Court of Errors to a court of lower rank—the Superior Court—but it was really a promotion. The judges of the Superior Court were, in the proper sense, judicial officers; and as, with the incoming of the nineteenth century, the jurisprudence of the State grew and developed on new lines, it was felt that they, rather than a legislative council, should, as to

all disputes over matters of law, exercise the supreme appellate jurisdiction.

Swift entered judicial life as a member of a bench of six judges, all men of mark. The chief-judge, Jesse Root, was one of the earliest of American reporters, publishing his first volume in 1798. He had been adjutant-general in the Continental army, and sat for five years in the Continental Congress. The senior associate-judge was Jonathan Sturges, a member for thirteen years of the Continental Congress, and for four of Congress under the present Constitution. Stephen Mix Mitchell (the grandfather of Donald G. Mitchell) had served five years in the Continental Congress, and succeeded Roger Sherman in the Senate of the United States. Tapping Reeve was the founder of the Litchfield Law School, and became the author of several legal treatises of high authority. John Trumbull was one of the "Hartford wits," the author of "McFingal" and other poetical works. Each of the six received the degree of Doctor of Laws from his *alma mater*; Root and Reeve from Princeton, and the rest from Yale.

The year following the reconstitution of the Superior Court, the judges adopted rules of practice, one of which abrogated the senseless practice which Swift had condemned in his "System," by requiring the presiding judge in charging the jury to give them the opinion of the court on all points of law that might arise. Since 1784, it had been their duty, in disposing of matters of law on writs of error, de-

murrer, special verdict, or motion in arrest, to put their opinions in writing to be filed with the clerk, that "thereby a foundation be laid for a more perfect and permanent system of common law in this State."⁴⁸ A similar duty was imposed by the same statute on the judges of the Supreme Court of Errors; but in 1809, in lieu of this, they were required, "each one to give his opinion publicly, with the reasons thereof."⁴⁹ Swift put a high value on this requirement. He wrote in 1810:⁵⁰

Judicial opinions are delivered in private, or remain unpublished, there is little restraint on unprincipled men, and they will be under strong temptation to gratify party, or personal feelings, at the expense of justice. But when the reason of their judgments are to be examined, and their errors, and injustice detected, and exposed, they will feel a high responsibility at the bar of the public, for their rectitude and correctness: though unrestrained by the principles of justice, or the dictates of conscience, they would blush at the publication of an opinion that impeached their understanding, or questioned their learning; though disposed to promote the views of their party, they would tremble at the idea of doing it, at the sacrifice of their reputation: and instances have occurred where men who have manifested little regard to principle, when pursuing the objects of a party, have, when on the bench, felt so strongly this responsibility of character, that their decisions were impartial, and correct.

In May, 1815, he was elected chief-judge of the Supreme Court of Errors, and at the same session of

⁴⁸ Connecticut Statute, ed. 1784. Appellate Sessions Law, May Session, 1784, p. 267.

⁴⁹ Session Laws, 1809, p. 22.

⁵⁰ Swift, Digest of the Law of Evidence, etc., sec. 7.

the legislature, probably at his instance, it was enacted that the public statement of the opinions of its members in any case should be made at the time when judgment was pronounced.⁵¹ Up to this time it had been usual, after deciding a cause, to assign the work of preparing the leading opinion to one of the bench; the others either simply announcing their concurrence or dissent, or adding opinions of their own at length, as they might think proper.⁵² As soon as Swift became chief-justice (and by that time, although the official title of the office remained Chief-Judge until 1818, Chief-Justice was the term of common usage) he inaugurated a new practice,—that of always stating his own opinion first, whether it did or did not express the judgment of the court.⁵³ This practice was not relished by all his associates,⁵⁴ but it was maintained as long as he remained upon the bench. When Chief-Justice Marshall became the head of the Supreme Court of the United States he did the same thing, but after a few years it was discontinued.⁵⁵

Swift's opinions were clear and emphatic, but he was not distinguished for excellence of literary style. Thomas Day, the reporter of his decisions, a very competent judge, said of him that he "generally

⁵¹ Session Laws, 1815, p. 193.

⁵² Correspondence and miscellanies of John Cotton Smith, p. 31.

⁵³ 1 Connecticut Reports, 299.

⁵⁴ Manuscript letter from the Reporter to Judge Simeon Baldwin, of March 7, 1817.

⁵⁵ Baldwin, *The American Judiciary*, p. 265.

cared less about the exact propriety than the force of his diction.”⁵⁶ He wrote easily and rapidly, but was seldom diffuse, nor was there ever anything slovenly in what came from his hand.

In the summer of 1815 occurred an unpleasant episode in his judicial career.

A man named Lung killed his wife. The coroner’s jury found that he had murdered her. It was some time before the next stated term of the Superior Court in the county would open. The Chief-Justice, under statutory authority, ordered a special term to be held. Without statutory authority, but exercising the common law authority of the court, he ordered a grand jury to be summoned and also a petit jury. The Superior Court was then held by three judges. Three were present at the opening of the special term, the Chief-Justice being one. No objection was then made to the course that had been taken. The grand jury promptly found an indictment for murder. Lung was arraigned, pleaded not guilty, and asked for delay. He was granted a delay till the afternoon of the second day of the special term, only. At that time the petit jury was impanelled and the trial begun. He was convicted and sentenced to be hanged, and the special term adjourned without delay.

At the next session of the General Assembly, Lung applied for a pardon. His counsel addressed the Assembly and complained bitterly of the summary

⁵⁶ 4 Connecticut Reports, Appendix, p. 17.

way in which his case had been disposed of in court. The Chief-Justice, they said, had done the whole business. He had called in a grand jury for the first day and a petit jury for the next, and made everything ready for their client's immediate execution, except the gallows. A laugh ran around the benches at this sally, and without much consideration a bill was passed in the lower house, and concurred in by the council by a majority of one, setting aside the judgment and sentence and directing that the charge might be made the subject of a new prosecution. There was a new one at the next regular term. He was again convicted and, this time, hanged.⁵⁷

The Chief-Justice was not content to let the matter end with this. He published a pamphlet of some fifty pages, in which he defended his own action and criticised that of the legislature. It had been supposed, he said, that Connecticut had a constitution, all the more sacred because it was too ancient to be recorded. It was embodied in the traditions and usages of centuries. He deprecated the calling of a convention to frame a written constitution. It would have too difficult a task. But the only way to make it unnecessary was to adhere strictly to those fundamental maxims of government which kept its departments coördinate and independent. The judiciary could not be subordinated to the legislature, with safety to the people. If Lung had any error of law to complain of, a higher court was provided to

⁵⁷ Lung's Case, 1 Connecticut Reports, 428.

rectify it—a court that would not act inconsiderately, nor be influenced by the arts of eloquence and appeals to sentimental considerations. What had Lung gained by this petition? Not the pardon, which he sought, but the new trial for which he did not ask. He had been led through the agonies of a second death, and all in vain.⁵⁸

Public opinion as to this affair was with the Chief-Justice, but it was one of the causes which contributed to the calling three years later of a constitutional convention.

By that time the Toleration party, whose foundations he had helped to lay, had risen to power on the wreck of Federalism. A constitution was framed in 1818 and adopted by the people. It remedied one of the evils which Swift had attacked in his "System," by giving the higher judges a tenure during good behavior, or until the age of seventy. The legislature thereupon passed a law that the judges of the Supreme Court of Errors should, after June 1, 1819, be five in number.⁵⁹ Previously there had been nine of them. Not unnaturally the prevailing party desired to establish in the court of last resort a majority who were of the new school of political thought. Two such had been put upon it the year before. Another was added in 1819, and only two out of the seven Federalist judges re-elected. The Chief-Justice, and Judges Gould, Trumbull, Edmond, and

⁵⁸ See Swift, "A Vindication," etc., Windham, 1816, pp. 40, 48.

⁵⁹ Session Laws, October, 1818, p. 45.

Smith, were thus dropped from the public service.

Swift and Smith had been, by appointment of the General Assembly, among the seven delegates from Connecticut to the Hartford Convention of the New England States, held in 1814, and Swift was one of the committee which drew up the statement of its final results and recommendations.⁶⁰ Some of the positions taken in this paper were not very dissimilar in principle to those advanced to justify the secession movement which led to the Civil War. The holding of the Convention was one of the most unpopular measures of the Federalist party, and contributed largely to its downfall. Few of those who took an active part in it remained long in public life.

Of the five judges who were retired in 1819, Smith, who until he went on the bench had been one of the leading advocates at the bar, re-entered practice and at once resumed his old position. Gould, who had since 1798 been an associate of Chief-Justice Reeve at the Litchfield Law School, now gave his time wholly to that work. Trumbull reverted to literary labors and at once busied himself in preparing a two-volume edition of his poetical works. This was published at Hartford in 1820, and prefaced by an autobiographical sketch. His feelings in regard to his loss of office may be inferred from the following passage with which the sketch is abruptly closed:⁶¹

⁶⁰ Dwight, *History of the Hartford Convention*, 391.

⁶¹ Trumbull, *Poetical Works*, vol. I, 22.

In 1801, he was appointed a Judge of the Superior Court of the State of Connecticut. From this period he declined any interference in the politics of the State, and applied himself exclusively to the duties of his office — being of opinion, that the character of a partizan and political writer was inconsistent with the station of a judge and destructive of the confidence of suitors in the impartiality of judiciary decisions. In 1808, he received from the legislature the additional appointment of a Judge of the Supreme Court of Errors. He was happy in the society of his brethren on the bench; and the Courts of the State were at no period more respectable for legal science, or more respected for the justice and integrity of their adjudications. To these offices he was annually appointed by the legislature, till their session in May 1819, when . . .

. . . *Desunt nonnulla* . . .

Swift did not resume active professional practice. Law students had for some years flocked to Windham to receive his instruction in such numbers that his office had become the seat of what was widely known at this time as Swift's Law School. Among his pupils were Charles J. McCurdy, Doctor of Laws, afterwards to become one of his successors on the Supreme Court of Errors, and Rufus P. Spalding, who became a judge of the Supreme Court of Ohio.

In 1820, 1821, and 1822 he represented Windham again in the lower house of the General Assembly. In 1820, he was appointed by the Assembly chairman of a committee of three to revise the statutes of the State. This had been rendered necessary by the adoption of the constitution, and the opportunity was taken to weed out a great deal that had become virtually obsolete, and add much that on a general

rearrangement seemed called for by the changes of time. The revisors recommended many important alterations, designed, in the words of their report "to improve and complete our judicial system."⁶² They consolidated, condensed, expunged, and restated to such good effect that the revision, when published, was hardly a third as bulky as the last preceding one, and made a small octavo volume of about five hundred pages. The Connecticut revision of 1821 holds a high rank in the history of American statute law. Swift had the largest share in the labor, and wrote the valuable preface.

While on the bench he had published (in 1810) the first American work on Evidence. It is still an important book of reference, and was supplemented by a few illustrative cases well selected from the English reports, including the far-reaching decision of *Omychund vs. Barker*. In the same volume was included a "Treatise on Bills of Exchange and Promissory Notes."

His new leisure enabled him now, in the last years of his life, to compose what was his *magnum opus*. This was his Digest of the Laws of Connecticut, in which he brought within the compass of two volumes of a moderate size all the leading rules and principles of English law and equity, so far as they were recognized in any of the United States. Had he entitled his work a Commentary on American Law, it would, with but few alterations and additions, have

⁶² Review of 1821, p. viii.

answered that description. His first volume was published in 1822, and the second in 1823, shortly before Chancellor Kent commenced the preparation of his Commentaries, the first volume of which was not issued until 1826.

Swift's Digest, like his System, went into almost every state of the Union. It had less that was local in it than the former work, and less that was rhetorical and argumentative. His Digest is a book of institutes. The rules are well stated; the matter is compact; the arrangement is well planned. A collection of forms was appended to it, but it is probable that it was not made by him personally.⁶³ They have, however, been quite extensively followed in practice, and are generally regarded as of considerable authority.⁶⁴

The work, as a whole, is a Connecticut classic. Whoever is really familiar with it is, as to English common law and equity procedure, a well-read lawyer. It became a saying that a country law office in Connecticut was well furnished if it had a three legged stool and Swift's Digest.

In 1853, a new edition, with references to new decisions, was published, prepared by Professor Henry Dutton, Doctor of Laws, of the Yale Law School with the collaboration of N. A. Cowdrey, of New York City.

⁶³ Colt vs. Eves, 12 Connecticut Reports, 261.

⁶⁴ Gould vs. Smith, 30 Connecticut Reports, 90; Taylor vs. Keeler, 50 Connecticut Reports, 350.

The second volume of the original edition bore on the title page the mournful line :

Extremum hunc, Arethusa, mihi concede laborem.

It was indeed the last product of the author's busy brain. He died while it was in press, on September 27, 1823, while on a visit to a son in Warren, Ohio, and there is his grave in the village cemetery on the bank of the Mahoning River.

The preface to the Digest contains a passage which aptly states the guiding principle of all his legal treatises :

It is only by systematizing a science that a man of ordinary memory can readily become master of it. It requires immense labor and a stupendous memory to be able to acquire a thorough knowledge of any branch of the law by studying the particular decisions. It amazingly facilitates the research by dividing and subdividing the subject under proper titles, to explain the principles applicable to each head, and then to support them by pertinent cases.

He closed with words breathing a more contented and a more kindly spirit than was shown by his colleague, Judge Trumbull, in the last sentence quoted above from the autobiography of the latter. They were these :

In retiring from the theatre of action I shall carry with me the pleasing reflection that I have discharged the duties which I owed to my country, and that my life has not been useless. I shall cherish during the remainder of my days the fondest remembrance of the numerous marks of personal respect and confidence I have

received from my fellow citizens, and the last wish of my heart will be for the continuance of their prosperity and happiness.

This sketch is the glad tribute to his memory paid by one of those for whom he wrote; for they were all who should ever thereafter desire to gain a close acquaintance with the jurisprudence of Connecticut. There is no other way than through his works.⁶⁵

⁶⁵ Nearly forty years after his death a question came before the court over which he had presided, as to the effect of a certain trust under his will. *Swift vs. Larrabee*, 31 Connecticut Reports, 226. No difficulty was found in directing as to its proper administration.

WILLIAM TILGHMAN.

WILLIAM TILGHMAN.

From an etching of Albert Rosenthal after a painting of Rembrandt Peale, in possession of the Law Association of Philadelphia.



W. E. L. H. M. A.

WILLIAM TILGHMAN.

1756-1827.

BY

HORACE STERN,

of the Philadelphia Bar.

WHEN at six years of age William Tilghman, afterwards chief-justice of Pennsylvania, came, in 1762, with his father to Philadelphia, that city was the largest and most influential in the American colonies. Benjamin Franklin had started the academy which later developed into the University of Pennsylvania, and had established a public library and also a society for the promotion of useful knowledge which was the germ of the American Philosophical Society. The same genius, aided by Rittenhouse, and following in the path of Logan and Bartram, had made Philadelphia famous as the home of the most advanced progress in science. During the years immediately preceding the Revolution the city forged rapidly to the front in population and commercial industry. In 1771 there were about 10,000 taxable inhabitants in the county, and the census which General Howe took in 1777, while the British were in possession, showed the existence of 5470 houses in the city proper, Southwark, and Northern Liberties. The exports of Philadelphia

were probably more than a quarter of those of the whole United States. The bar of Philadelphia was composed of the most brilliant group of lawyers in the country,—such men as Benjamin Chew, Joseph Galloway, John Dickinson (author of the famous “Letters of a Pennsylvania Farmer”), James Wilson, William Lewis, George Ross and Joseph Reed. The central location of Philadelphia as compared with that of Boston made the former the favored place for the meeting of the colonial congresses and later the first home of the confederate and the federal governments, so that it was generally regarded as the centre of American politics. In addition to all of these distinguishing features, the city of Philadelphia was noted for its social life; it outshone all other American cities in the brilliant festivities which characterize a metropolis.

Tilghman was by birth what is usually but loosely denominated an “aristocrat”; he lived to be practically the last man in public life in Pennsylvania who was descended from the colonial aristocracy and whose temperament mildly partook of the spirit of pre-Jeffersonian days. His family can be retraced to the time of Henry IV, occupying the manor of Snodgrass at Holoway Court, in the county of Kent. Richard Tilghman, great-grandfather of William, was a surgeon in the fleet of Admiral Blake, and upon the restoration of the Stuarts came to America, settling on the banks of the Chester River, Queen Anne County, Maryland, where he and his successive de-

scendants occupied an estate which they called "The Hermitage." Many of the members of the family achieved distinction in the colonies. William Tilghman's grandfather was a councillor of state and chancellor in Maryland, and William Tilghman's father, who removed to Philadelphia, became there a member of the Proprietary Council and secretary of the Proprietary Land Office of Pennsylvania. Of the brothers of William Tilghman, one, Colonel Tench Tilghman, served as aide-de-camp to General Washington during the greater part of the Revolutionary War; another, taking the loyalist side in the Revolutionary struggle, became a captain in the British navy. Edward Tilghman, one of the greatest of Philadelphia lawyers and leader of its bar in the generation preceding that of Horace Binney, was a cousin of William Tilghman. On his mother's side Tilghman was the grandson of Tench Francis, attorney-general of Pennsylvania, who was said to have been the most learned and best trained lawyer of colonial Philadelphia, and who was connected by marriage and association with the most eminent families of the Philadelphia bar.

Born August 12, 1756, near Easton, on the eastern shore of Maryland, William Tilghman, as has been stated, came early to Philadelphia, and was educated at the Academy, where he pursued the usual classical studies then the basis of a collegiate course. He remained at college, after taking his bachelor's degree, until 1771, and in February, 1772, entered the

office of Benjamin Chew to begin the study of the law. Chew was then at the head of the legal profession in Philadelphia; later he became the last chief-justice of the Province under the proprietary government. During the four years that young Tilghman remained in Chew's office he delved deeply into the classical English commentators, not Blackstone as the commentaries had only recently been published, but Bracton, Glanville, Littleton, Coke and Plowden; and thus laid the foundations of a remarkably thorough and minute acquaintance with the fathers of the common law. These studies were interrupted by the outbreak of the Revolutionary War, which caused the loss of his father's office under the proprietary government, whereupon the family returned to Maryland. Here William Tilghman remained in retirement during the seven years of the struggle for independence, carrying on, in the seclusion of his father's estate and in the small town of Chester, his studies in literature, history, and law. It was not until the spring of 1783 that he was admitted to the bar; it was characteristic of his conservative, painstaking nature that he should thus have waited to make his official entrance into his profession until he was twenty-seven years of age, and after so many years of matured study and reflection. The prominence of his family was itself an introduction for him into the field of politics. He was soon elected and re-elected a member of the House of Delegates and afterwards a senator of Maryland;

and in 1789 was appointed an elector to choose the first president of the United States. Political life was not, however, to his liking; the city of his early school training attracted him, and in 1793 he again came to Philadelphia, and thenceforth made that city his home, identified himself with its activities, and became one of its most illustrious citizens.

It cannot truthfully be stated that Tilghman achieved unusual success in the active practice of his profession. It has been said that a good lawyer rarely makes a good judge, and the converse probably is likewise true. The lawyer to be successful must be aggressively partisan; in presenting arguments upon a proposition of law he is guided not so much by the abstract search for truth as by the desire to present to the court all that can be said in favor of the views which it is incumbent upon him to expound. From the partisan arguments thus presented by counsel, the court steers its way to the truth, which is frequently and perhaps even usually at variance with the extreme positions assumed by both of the lawyers arguing the case. Tilghman had the judicial temperament—the habits of scholarly research and cold, unimpassioned reasoning upon the facts. He was neither forceful nor vehement nor oratorical. As a practicing lawyer, therefore, his fame was eclipsed by that of many of his contemporaries. The Philadelphia bar had maintained its earlier traditions, and was represented then as formerly by some of the most brilliant of American

lawyers. It had contributed James Wilson to the federal Supreme Court and William Bradford as attorney-general of the United States. Its membership embraced Jared Ingersoll, Alexander James Dallas, Richard Peters, Edward Tilghman and William Lewis. In Philadelphia, too, were held the sessions of the Supreme Court of the United States, and to the bar of the highest tribunal in the land came the most eminent practitioners from the other states of the Union. Tilghman's name is found in the reports of this period quite frequently, but it was for the bench and not the bar that his talents were adapted, and it was in judicial position and not as an advocate that his enduring fame was destined to be attained.

By the act of February 13, 1801, Congress reduced the Supreme Court of the United States to five justices, relieved them from circuit duty, and created six circuits, each circuit to consist of a chief judge and two associates. The result was the famous quarrel between President Adams and President Jefferson, as to the appointment of these new circuit judges. Adams named his appointees when about to retire from office, and some of them were confirmed by Congress as late as midnight of March 3, 1801. From this fact arose the derisive title of "Midnight Judges," which was coined by the enraged Republicans. Tilghman was one of these appointees. Adams had designated Jared Ingersoll as the chief judge of the third judicial circuit (including Penn-

sylvania, Delaware, and New Jersey) but Ingersoll declined, and Tilghman was appointed and confirmed in his stead. The new courts were extremely hateful to the opponents of the Federal party, and popular prejudice assailed them from every side.¹ The Republicans claimed that they were bitterly partisan in their activities, and as soon as Jefferson was inaugurated president he busied himself in undoing the hurried work of his predecessor. To remove the new judges from their offices would, it was claimed by the Federalists, be unconstitutional, since federal judges were to hold office during good behavior. Jefferson, however, was a man of expedients; if the judges could not be taken from the offices, the offices could be taken from the judges. On April 29, 1802, the Republican majority in Congress repealed the entire act, and Tilghman's first experience as a judge came to an abrupt termination. His proud, reserved nature was chagrined by this discourteous treatment; his opinion was that the repealing act was unconstitutional, and to the end of his life, it is said, he never referred to his service

¹A jury in the third circuit having found a verdict against one William Duane, a leading publisher of the day, his newspaper characterized the proceedings in flaring head-lines as follows: "Struck juries and Mr. Adams' Judiciary Law give very happy exemplifications of the moderation and the kind of justice which republicans are to expect from their adversaries. Moderation in the mouths of tories; daggers and dungeons in their hearts!" The outraged court at once issued an attachment against the offender, and Duane was scathingly rebuked by Judge Tilghman and sentenced to a thirty days' imprisonment. *Hollingsworth vs. Duane*, Wallace's Circuit Court Reports, 77; *United States vs. Duane*, Wallace's Circuit Court Reports, 102.

in the Federal judiciary, but avoided the subject with scrupulous sensitiveness. The decisions rendered by the court of the third circuit during the brief period of its existence are reported in a volume by Wallace, Senior; among the cases are fourteen in which Tilghman delivered opinions, and they are worthy of study as representing the earliest examples of the future Chief-Justice's methods of reasoning and his concise literary style.

The second experience of Tilghman as a judge began on July 31, 1805, with his appointment by Governor McKean as president judge of the courts of the first judicial circuit of Pennsylvania, which consisted then of the counties of Philadelphia, Bucks, Delaware, and Montgomery. He scarcely had taken his seat upon the bench, however, when the venerable Edward Shippen, chief-justice of Pennsylvania, expired, the second incumbent of that lofty office since the foundation of the commonwealth, McKean himself, then governor, having been the first. The office at that time—instead of being as now elective—was within the appointive powers of the governor, and McKean tendered the position to Edward Tilghman, who refused it but recommended his cousin William, and McKean accepted the suggestion. Thus for the second time Tilghman received his judgeship as it were by accident—by the declination of the person to whom it had first been tendered. Tilghman was not popular at that time with the masses of the people, who looked upon him

as an adherent of the monarchical tendencies of the Federalists. A number of citizens waited on Governor McKean in reference to the appointment, and informed him that they came as representatives of the Democratic party. The Governor made a profound bow, and asked what they desired. The appointment of a man more in accordance with their wishes, they said. "Indeed," said McKean, who was of an arrogant, violent, and indomitable nature, "inform your constituents that I bow with submission to the will of the great democracy of Philadelphia, but by God! William Tilghman shall be chief-justice of Pennsylvania;" And chief-justice William Tilghman accordingly became.

What manner of man was it who, on February 28, 1806, was thus commissioned to the highest judicial office in the state of Pennsylvania? What were his characteristics? It is hard to reproduce vividly the personality of one belonging to a generation so remote from our own, but as far as can be gathered from the reminiscences of those who knew him best, Tilghman was an austere, dignified, upright, and patriotic man. As he was not of strong passions, so also he was free from the slightest semblance of cant or affectation. He was generous and kindly, although superficially cold and impassive. In all of his opinions there is not to be found a line that could be construed to be within the domain of humor, nor, on the other hand, is there a rough or harsh reproach, a vulgar or supercilious word, or the slightest exhi-

bition of temper. Reserved in his nature Tilghman was, it is true, but beneath the austerity of his bearing there lay the impulses of a big-hearted and broad-minded citizen. He was interested not merely in his chosen profession but in all of the sciences and arts. He was an active member and for many years the vice-president of the Philadelphia Society for Promoting Agriculture. He was the president of the Society for the Encouragement of American Manufactures, and so ardent an enthusiast in encouraging domestic industries that for the last ten years of his life he refused to wear any articles of clothing imported from abroad. He was a member of the Academy of Natural Sciences and of the Academy of Fine Arts, one of the Board of Trustees of the University of Pennsylvania, the first president of the Philadelphia Athenæum, the first president of the Law Academy of Philadelphia after its incorporation, and a member for twenty-two years of the American Philosophical Society, of which illustrious organization he was vice-president for nine years and president for the two final years of his life. Because of his scholarship, Harvard University conferred upon him the honorary degree of Doctor of Laws. Thus it can be seen how broad he was in his sympathies, and how ardent in the pursuit of all that made for culture and progress. There have not been many judges in our history who have been so catholic in their interests, and who devoted themselves so persistently to the communal welfare.

This much must be admitted, that Tilghman had not what is popularly spoken of as a "strong" personality. He was not one of that numerous class of American statesmen and jurists who achieved their success and endeared themselves to the public by brilliant attainments and incisive, fearless manner. He was not a man of the people, and scarcely a single anecdote concerning him has come down to us to illumine the human side of his nature and reveal the true greatnesses and foibles of the man himself. But as he was not pronounced and dogmatic in his opinions the very qualities which to the layman would render him colorless and uninteresting made him the ideal judge. The statesman may be a man of inspiring energy and quick action; the judge should be painstaking, accurate, and deliberative, and these qualities Tilghman had in the highest degree.

The greatest monument to Tilghman is the series of opinions which he wrote as chief-justice of Pennsylvania,—opinions reported in the twenty-one volumes from 1 Binney's Reports to 15 Sergeant and Rawle's Reports, with a few others scattered in 4 Yeates's Reports and 4 Dallas's Reports, and representing decisions in more than 1300 distinct cases. In every respect Tilghman was eminently qualified to hold his lofty position. In the first place he was a profound scholar, learned not only in technicalities of the common law but in the broad underlying philosophy of jurisprudence, as well as in literature, languages, history, and the arts and sciences in gen-

eral. Secondly, he was as logical a reasoner as has ever graced the bench in any of the American commonwealths. It has been said that his opinions proceed as from the inexorable working of a well-ordered machine; the premises once granted the deductions follow faultlessly to the final decision. Furthermore Tilghman was a man of no prejudices, political or otherwise. He was so far from allowing any opinions of his own to influence his judicial deliverances that, although he was personally opposed to slavery and manumitted his slaves by a system of gradual emancipation, he nevertheless declined to take part in a public meeting to consider the question of the Missouri Compromise, because being frequently called upon to decide cases involving questions of slavery he wanted his impartiality in such matters to be neither impaired nor doubted. From his written opinions no one could detect the leaning of his sympathies on the slavery question. He held inexorably to what he conceived to be the law of the land, and he was devotedly attached to the Constitution. In *Wright vs. Deacon*,² in holding conclusive a certificate given by a magistrate to the owner of a runaway slave (which certificate under the Fugitive Slave Law was to be a sufficient warrant for the removal of the fugitive to the owner's state), and in deciding therefore that a writ did not lie in such case to try the right of the fugitive to freedom, Chief-Justice Tilghman said: "Whatever

² 5 Sergeant and Rawle's Reports, 62.

may be our private opinions on the subject of slavery, it is well known that our southern brethren would not have consented to become parties to a constitution under which the United States have enjoyed so much prosperity, unless their property in slaves had been secured. This constitution has been adopted by the free consent of the citizens of Pennsylvania, and it is the duty of every man, whatever may be his office or station, to give it a fair and candid construction." What words could be more expressive of a just and impartial mind?

Another important qualification of Tilghman as a judge was that he was always a patient searcher after the truth; he was never inaccurate in the meretricious desire to be brilliant. Was the question one of international law, he would laboriously study and cite Grotius, Burlamaqui, Heineccius, Vattel, Martens, Coke, Wynne, Ward, and the Marquis of Beccaria, all of whom appear, for example, in the case of *Commonwealth vs. Deacon*.³ Was the question one of practice he would call to the bar of the court the most venerable and respected members thereof in order to learn from the wealth of their recollections the forms and usages that had prevailed in the days of the colonial bar, and thus in many a report we find the Chief-Justice deciding such questions only after consultation with Lewis, Ingersoll, Edward Tilghman, or some of the other leaders of the older bar. There was never a judge who listened more

³ 10 Sergeant and Rawle's Reports, 125.

affably and patiently to the argument of counsel. He was always kindly and gentlemanly, never petulant nor irritable. During the argument of cases he would take copious notes and conscientiously examine and consider every case cited by the attorneys; this was his invariable practice and in marked contrast both with his predecessor McKean and with his more brilliant but frequently less reliable successor, Chief-Justice Gibson, who was wont to boast that he could pretend to follow the argument of counsel without listening to a word they said! The result of this striving of Tilghman after accuracy is that he is the most widely cited of all Pennsylvania judges, and there probably has been no other judge whose opinions so rarely have been overruled. There being no personal element whatever in his opinions, it must be admitted that they are not nearly so interesting as those of Gibson, whose nature was far more emotional and passionate, and who was continually thrusting his personality, consciously or unconsciously, into his opinions. Tilghman's decisions are purely an intellectual production and have therefore been properly characterized as secure but not picturesque. Tilghman did not care for the picturesque. Even in his deportment as a judge he showed an utter indifference to any form or ceremony approaching ostentatious display. He desired that popular respect for the law should be based upon its merits rather than upon superstitious reverence for traditions or upon awe of imposing cere-

monials. His predecessors had been wont each morning to ascend the bench in state; every morning the sheriff with his rod of office and accompanied by other officials had attended the chief-justice and associate-justices at their lodgings, and accompanied them, clad in their scarlet gowns and great cocked hats, to the court-house. These ceremonies Tilghman swept away as unworthy of the true majesty of the law and the dignity of the great republic. His mind sought after the substance of things, after the essential and not the tawdry and the superficial.

To point out specifically any distinctive development of Pennsylvania law as a result of Chief-Justice Tilghman's decisions is difficult if not wholly impossible. It is the function of a great judge to expound and not to create the law. The legislator seeks to correct existing faults in the body of the law; the judge must construe the law as it exists, oblivious of all considerations as to its wisdom or defects. The judge therefore can rarely attain the fame of the legislator, nor impress his personality so markedly upon his work and through his work upon the life of his generation. Moreover the questions that come before the judges of a state court for solution are not usually of the same general interest or far-reaching importance as those decided by the federal courts. The cases upon which were built the fame of Marshall and of Taney were political rather than legal in their nature, and called for the wisdom of a statesman rather than the learning and reasoning powers

of a judge. Besides they were of sensational import, reaching to the very basis of American political life and theories. In the history of Chief-Justice Tilghman there is scarcely a single opinion, if indeed there be any, which can be characterized as of unusual or striking importance. The range of subjects calling for adjudication was much narrower then than now. There were no difficult problems of corporation law or of common carriers; the law of negligence, now so often invoked, was then almost wholly undeveloped. The principal questions upon which Tilghman had to pass were those concerning real estate, especially disputes over surveys and the grant of patents to lands by the state, the distribution of decedents' estates and the construction of wills, marine insurance, actions of slander and libel, questions of practice and of criminal law, and disputes over arbitration, then a much more common method than now of settling cases, owing to an act of 1806 which established a compulsory mode of trial by arbitration. But, although the subjects were then more limited in their scope, there were greater opportunities for reasoning out the general principles of the law. There was more room for an application to the law of the teachings of philosophy, sociology and economics. There was less precedent and the law was not so circumscribed by the workings of the inexorable doctrine of *stare decisis*. As a result a great jurist had more opportunity to display his reasoning and constructive powers, and as a

matter of fact we find throughout Tilghman's opinions discussions upon the merits of each case rather than a citation of precedents. Tilghman was not a great case-lawyer. To read his decisions is not so much to find lengthy histories of the development of the law as to enjoy clear, deliberative and terse reasoning upon the particular facts presented for adjudication.

By far the most important work of Tilghman's judicial career was his incorporation into the law of Pennsylvania of the principles of scientific equity. This service can be understood only by those acquainted with the history of equity jurisprudence in Pennsylvania. From the first settlement of the Colony there had been a continual dispute as to the person in whom the office of chancellor ought to vest under the charter. The result was that for thirty-eight years no court of chancery existed in Pennsylvania. In 1720 the legislature of the Colony requested the then governor, Sir William Keith, to hold such a court, and it was accordingly established and remained in existence until 1736, in which year the legality of its organization was attacked by the legislature and the court was thereupon abandoned. An attempt was made to establish other courts of equity but without success, and from that time until the present day Pennsylvania has had no separate courts for the administration of equity. To take their place there was developed a system by which equitable principles and remedies were administered

under common law forms and by common law courts, and it was Tilghman to whom the practical working out of this system was due. Not that Tilghman originated the doctrine—for as early as 1787 Chief-Justice McKean proclaimed that “Equity is a part of the common law of Pennsylvania,” and that the ordinary courts were competent to apply the rules of equity under their own forms of proceeding. But Tilghman applied this general and vague principle to great numbers of specific cases and developed in real practice the system which is so familiar to present-day Pennsylvania lawyers. As one of many illustrations of what is meant by this Pennsylvania doctrine, may be cited *Murray vs. Williamson*,⁴ which is a case in which Chief-Justice Tilghman decides that the equitable owner of a *chose in action*, though unable to sue in his own name, may set it off against the obligor who brings covenant upon an indenture of lease to recover rent in arrear. From such decisions was evolved a system in which the lack of separate courts of equity was rendered comparatively unimportant—a system that is a tribute to the ability of the Anglo-Saxon genius to preserve and develop the fundamental principles of justice under whatever new circumstances or conditions may present themselves and in the face of whatever obstacles may be thereby entailed.

Tilghman was at once both conservative and progressive. He had a profound veneration for the

⁴ 3 Binney's Reports, 135.

common law, and abhorred judicial legislation. "To a judge it is only permitted to interpret the law honestly and impartially;" he says in *Enslin vs. Bowman*,⁵ "if, when interpreted, it is attended with inconvenience, it is for the higher powers to provide a remedy." And yet no judge was freer than he in shaking off the yoke of technicalities, whose usefulness had been outworn with time. No judge was more eager than he in distinguishing in the great structure of the English common law between such principles as were permanent and fundamental and such as were useful only in the country and age in which they originated. He believed in establishing a common law for Pennsylvania which should be based upon only such features of the English law as were applicable to conditions in the new commonwealth. In *Guardians of the Poor vs. Greene*,⁶ he says in strikingly concise and forceful language:

Every country has its common law. Ours is composed partly of the common law of England, and partly of our own usages. When our ancestors emigrated from England, they took with them such of the English principles as were convenient for the situation in which they were about to place themselves. It required time and experience to ascertain how much of the English law would be suitable to this country. By degrees, as circumstances demanded, we adopted the English usages, or substituted others better suited to our wants, till at length, before the time of the revolution, we had formed a system of our own, founded

⁵ 6 Binney's Reports, 462.

⁶ 5 Binney's Reports, 554.

in general on the English constitution, but not without considerable variations.

This position was consistently followed by Tilghman throughout his judicial career. Over and over again his opinions deliberately reject the English law as not being adapted to modern or to local conditions. In *Alexander vs. Jameson*,⁷ he decides that a jury may, upon retiring, take out with them any writings that have been presented in evidence, without distinction as to whether such writings are sealed or unsealed. The English practice forbade the jury to take out unsealed writings, but Tilghman refused to extend such a doctrine to our courts, as it was a rule which "in many cases would produce confusion and injustice." The English law was that all fresh-water rivers belonged to the owners of the soil adjacent, and by fresh-water rivers were understood rivers where the tide did not ebb and flow and which were therefore said to be non-navigable. In *Carson vs. Blazer*,⁸ and *Shrunk vs. Schuylkill Navigation Company*,⁹ Chief-Justice Tilghman refused to adopt and apply this law as the law of Pennsylvania. He pointed out that the rivers in England were wholly different from ours; that we had broad highways such as the Susquehanna, the Ohio, Allegheny, Monongahela, Juniata, Lehigh and Schuylkill, which, under the English definition, would be

⁷ 5 Binney's Reports, 238.

⁸ 2 Binney's Reports, 475.

⁹ 14 Sergeant and Rawle's Reports, 71.

held non-navigable, and yet where it would be manifestly against public policy to allow the abutting property owners to extend the boundaries of their lands "*usque ad flum medium aquæ.*" And thus he saved to the state the control of its waterways and the ownership of the beds of its rivers.

Of the right of trial by jury, the liberty of the press, the right to the writ of habeas corpus, and the other bulwarks of English individual liberty, Tilghman was a devoted friend. He allowed no technicalities to stand in the way of the broad enforcement of these fundamental rights. In one of his most famous opinions, in the case of *Commonwealth vs. Duane*,¹⁰ he established the long contested general rule that security for good behavior should not be demanded before conviction in cases of alleged libel, where the accusation involves the principle of the liberty of the press—"a decision," says Mr. Duponceau, "worthy of Holt or Camden, and of the best times of English freedom."

Tilghman was sometimes called upon to decide questions of constitutional law, a task which in that day was a most delicate and formidable one, although the decisions usually lack importance as being subject to review by the United States Supreme Court. The states were continually protesting against what they alleged to be usurpations of their power by Congress, and the state legislatures were indignant at the claim made by the courts that there

¹⁰ 1 Binney's Reports, 99.

existed in the judiciary a power to declare unconstitutional, and therefore void, acts duly passed by the legislatures. Here there were no precedents to guide; the form of our government was comparatively unique and untried. The common sense and far-sighted statesmanship of Tilghman brought him in all such questions to the position which proved to be the salvation of the nation. In his personal views on all important constitutional questions Tilghman was in accord with Chief-Justice Marshall. He was perfectly conversant with the nature of our federal system, and with keen eye distinguished between the relative powers of the state and federal governments. The doctrines which he formulated in his opinions on this subject are as sound in our day as they were when he first enunciated them. And as for the power of the court to declare acts of the legislature void as being unconstitutional, Tilghman stoutly defended the existence of such a right, saying in *Eakin vs. Raub*,¹¹ that he never entertained any other opinion on this point, although in this very case Gibson, in a lengthy argument, stated his view to be that the court could not declare an act of the legislature void merely on the ground that the court considered it to be opposed to the constitution of the state, and judges in many of the other states of the Union were promulgating the same theory. Tilghman's judgment thus proved itself to be as sound as were his scholarship

¹¹ Sergeant and Rawle's Reports, 330.

and his logic, though Gibson's argument is perhaps the ablest statement of the opposite point of view.

Not long after Tilghman had become chief-justice of Pennsylvania he and his associates were called upon to undertake a work of considerable importance; namely, to report to the legislature which of the English statutes were in force in the commonwealth, and which of those statutes ought, in their opinion, to be incorporated into the statute laws of the state. In order to carry out this commission, which, as the justices reported, was "executed during the short intervals of official occupation," and occupied them for two years, it became necessary to retrace the laws of the state to the charter granted to William Penn and also to consider the general principles of colonization. The justices themselves set forth the difficulties attendant upon the work:

We have been obliged to examine the code of English statute law from the beginning to the time of settlement of Pennsylvania, and to weigh deliberately which of them were proper to be adopted. But this was not all. It was essential that our statute book should be examined, to see in what cases the English law had been altered, or in what cases it had been expressly extended here. . . . Besides these inquiries, it was necessary to ascertain what had been the decisions of our own courts respecting the extension of English statutes. This was no easy task, as we have no printed reports prior to our revolution, of cases determined in our courts of justice. Of course these decisions are only to be known by tradition, or manuscript notes in the possession of the gentlemen of the bar or the judges.

Although the report made by the court in this matter has not technically the authority of adjudicated cases, it has been generally accepted by the courts and the profession as authoritative, and it constitutes a monument to the industry and scholarly research of Tilghman and his fellow judges who compiled it.

In all of Tilghman's opinions there is no striving after effects, no attempts at epigrammatic and oracular utterances. His style is lucid and precise, but forceful and convincing, frequently becoming rhetorical, and always graceful in its diction. No judge in Pennsylvania has excelled Tilghman in the conciseness of his opinions; his associates, Justices Yeates and Brackenridge and later Justice Duncan, wrote long laborious opinions wandering over fields far removed from the specific questions involved in the case. Tilghman's opinions are succinct and concern themselves only with the issue presented; it is not uncommon to find an opinion of Tilghman a page or a half page in length, with concurring opinions of his associates of ten, fifteen, or even twenty pages, and yet not more complete nor convincing than those of the Chief-Justice. Tilghman's opinions are of literary merit, and they were never written without the preparation, deliberation and caution which were characteristic of all his work. It has already been stated that he gave careful attention to the arguments of counsel, and well he might, for the Philadelphia bar that practiced before him com-

prised such distinguished names as Rawle, Sergeant, Dallas, Levy, Chauncey, Binney, Phillips, Duponceau—a brilliant galaxy who made the term “Philadelphia lawyer” synonymous with all that is best in the legal profession, and gave to Philadelphia traditions inferior to those of no other American city, and a reputation in the legal world which it enjoys to this day.

The Supreme Court in Tilghman’s time held its sessions in different cities of the state—Philadelphia, Lancaster, Sunbury, Chambersburg, and Pittsburg—and as travelling was then, before the days of the railroad, attended with considerable inconvenience and loss of time, the judges had little leisure from the duties of their offices. Moreover the Supreme Court judges were obliged to travel on circuit and to hold *nisi prius* courts for the trial of cases, and they were also ex-officio members of the High Court of Errors and Appeals, which was a court established in 1780 to hear appeals from the Supreme Court in certain cases. Tilghman was always punctual in the discharge of these various duties. Unfortunately for him he had no home ties to distract him from constant application to his work. Shortly after coming to Philadelphia he had married Margaret Allen, granddaughter of Chew’s predecessor in the office of chief-justice of the province of Pennsylvania, and great granddaughter of Andrew Hamilton, one of the greatest of Pennsylvania’s colonial lawyers. She died, however, soon after their mar-

riage, leaving a daughter, Elizabeth Margaret, who died in 1817 and whose son, William Tilghman Chew died in infancy. The Chief-Justice, at the age of 63, had survived parents, brothers, sisters, wife, child and grandchild, and was pathetically alone in the world. The death of his grandchild was an especially severe blow to him, but he bore his misfortunes with the calm fortitude which characterized him always and in the true spirit of religious consolation. "I am at peace with all the world," he said to some of his friends a few days before his death: "I bear no ill-will to any human being; and there is no person in existence to whom I would not do good and render a service if it were in my power." When he died, April 30, 1827, there passed away a true gentleman, modest, gentle, and retiring.

Horace Binney, in a noble eulogy upon Tilghman delivered before the members of the Philadelphia bar, said:

The praise of his public career is that it had been barren of those incidents which arrest the attention, by agitating the passions, of mankind. If it has grown into an unquestioned truth, that the poorest annals belong to those epochs which have been the richest in virtue and happiness, it may well be admitted that the best judge for the people, is he who imperceptibly maintains them in their rights, and leaves few striking events for biography. His course does not exhibit the magnificent variety of the ocean, sometimes uplifted to the skies, at others retiring into its darkest caves,—at one moment gay with the ensigns of power and wealth, and at another strewing its shores with the melancholy fragments

of shipwreck;— but it is the equal current of a majestic river, which safely bears upon its bosom the riches of the land, and reads its history in the smiling cities and villages that are reflected from its unvarying surface.

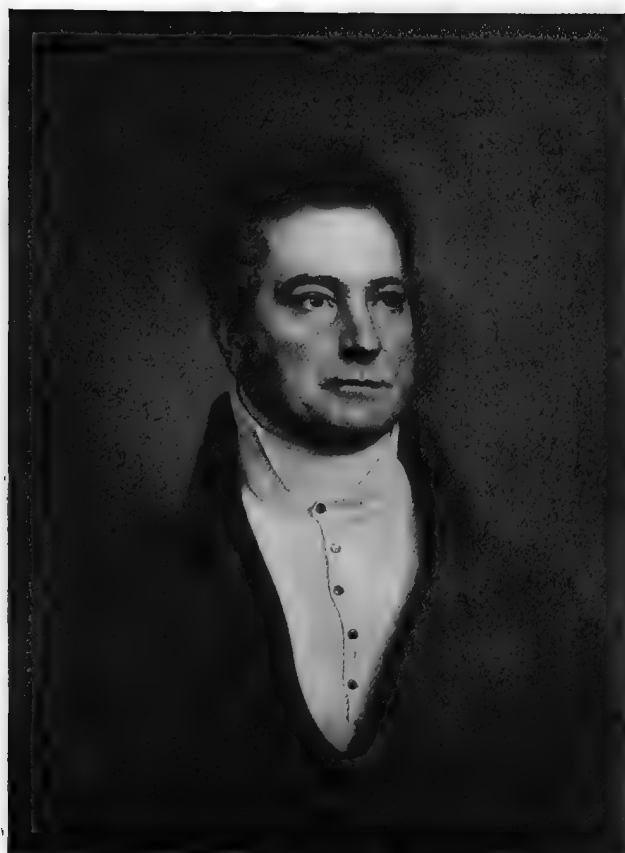
Tilghman's latest successor, the present chief-justice of Pennsylvania, says that he was "one of the wisest and most careful judges who ever adorned any bench," ¹²—a striking tribute to him who became chief-justice of the state just one hundred years ago.

¹² Mr. Justice Mitchell in *Commonwealth vs. Smith*, 185 *Pennsylvania Reports*, 553, at page 570.

WILLIAM PINKNEY.

WILLIAM PINKNEY.

From a painting of Rembrandt Peale, probably executed prior to Pinkney's last visit abroad, in possession of the Honorable William Pinkney Whyte of Baltimore.



WILLIAM PINKNEY.

1764-1822

BY

ALFRED SALEM NILES,

Associate Judge of the Supreme Bench of Baltimore City.

CHIEF-JUSTICE MARSHALL once said of an American lawyer that he was the greatest man he had ever seen in a Court of Justice.¹ Chief-Justice Taney wrote for publication, in 1854, of an American lawyer, "I have heard almost all the great advocates of the United States, both of the past and present generation, but I have seen none equal to him."² Judge Story, in 1814, wrote of an American lawyer, "Every time I hear him he rises higher and higher in my estimation. His clear and forcible manner of putting his case before the Court, his powerful and commanding eloquence, occasionally illumined with sparkling lights but always logical and appropriate, and above all, his accurate and discriminating Law knowledge, which he pours out with wonderful precision, give him in my opinion, a great superiority over every man whom I have

¹ Tyler's Memoirs of Roger B. Taney, p. 141.

² Tyler's Memoirs of Roger B. Taney, p. 71.

known.”³ Chief-Justice Marshall, Chief-Justice Taney, and Justice Story were all alluding to the same man. His name was William Pinkney of Maryland.

The United States of America has produced many great lawyers. Indeed, of no other thing has our country more reason to be proud than of her long list of eminent jurists. All these in their day and generation attained a proud position among their countrymen; for, as a nation, we have always, at least vaguely, realized that safety of life, liberty of action, increase of wealth, material, mental and social expansion, depend fundamentally upon law—wisely enacted, and administered with impartiality and enlightenment. But the quotations which have just been given show that among all American lawyers, William Pinkney’s place is unique. One or other of those great Justices of the Supreme Court was sitting upon its bench during a period covering more than one-half of our national existence; they listened to the arguments of the giants of old, sons of Anak like Luther Martin, William Wirt, Rufus Choate and Daniel Webster; their point of view on almost every question was absolutely different; they differed in mental latitude by many more degrees than those which separate Massachusetts from Virginia. And yet, upon the point as to who was

³ William Pinkney. An address by William Pinkney Whyte, now (1907) United States Senator from Maryland. Proceedings of Maryland State Bar Association, 1904, p. 86.

the greatest lawyer they had ever heard, all concur, and the judgment pronounced is unanimous.

William Pinkney can be claimed by but one State. He was born at Annapolis in 1764. He died on the 25th of February, 1822, at Washington, where he was serving as a senator from Maryland; and during the fifty-eight years of his life—except while he was abroad in the diplomatic service—he had no home outside of his native state. His father was a tory, but William possessing, even in his early youth, that confidence in the correctness of his own opinion which was afterwards characteristic of the man, ardently espoused the cause of the Revolution; and, at times, escaping the vigilance of his parents, would, as a boy, mount guard with the continental soldiers in the fort at Annapolis.⁴ Although it seems plain now that Pinkney was a born lawyer, as much as any man was ever born a poet, his parents do not seem to have recognized his natural bent, for they appear to have at first intended to make a physician of him, and he actually commenced the study of medicine under Doctor Goodwin, an extensive practitioner in Baltimore. But, before he was twenty years old, Samuel Chase, then at the head of the Maryland bar, and afterward one of the Justices of the Supreme Court of the United States, heard him take part in a debating society contest, and at once recognized in him the genius and the temper of the true advocate.

⁴ William Pinkney, in Spark's Library of American Biography, page 1.

Judge Chase advised him to study law, invited him back to Annapolis, where the superior courts of Maryland were then held, offered him the free use of his library and whatever other aid he could afford him, and so persuaded him to enter upon the vocation whereto by his every instinct he was called. In 1783 he commenced his legal studies and in 1786 was called to the bar, moving to Harford county to commence the practice of his profession.

At that time in Maryland knowledge of the law of Real Property and of the law of Special Pleading were considered as the two great foundations of legal distinction. Before he was admitted to practice, Pinkney's attainments in each of these branches of learning were both accurate and profound, and he at once leaped into a leading place at the bar. Mr. Wheaton⁵ speaking of this time of his life, and quoting largely from Mr. Walsh says, "During all this period he continued indefatigably devoted to his professional pursuits and gradually rose to the head of the bar, and to a distinguished rank in the public councils of his native state. His acuteness, dexterity and zeal in the transaction of business; his readiness, spirit and vigor in debate; the beauty and richness of his fluent elocution, adorned with the finest imagery drawn from classical lore and a vivid fancy; the manliness of his figure and the energy of his mien, united with a sonorous and flexible voice and a general animation and graceful delivery, were

⁵ Wheaton's, *Life of William Pinkney*, p. 24.

the qualities by which he attained this elevated standing." In 1789 Mr. Pinkney was married to Miss Ann Maria Rogers of Havre de Grace.

From 1788 to 1792 he was a member of the Maryland Legislature. There is preserved to us a speech which he made in 1789 in that body, in reference to the report of a committee appointed to consider the laws of Maryland prohibiting the voluntary emancipation of slaves. It is certainly the speech of a young man, florid in its ornamentation, and, at any rate to a southern man of the present day, a trifle extreme in its sentiment. But just as certainly is it the speech of a young man of promise and of one to whom our souls are drawn; for it is full of vigor, enthusiasm and of a generous spirit. The following paragraph is characteristic:

Sir, it is pitiable to reflect on the mistaken light in which this unfortunate generation are viewed by the people in general. Hardly do they deign to rank them in order of beings above the mere animal that grazes in the field of its owner. That an humble, dusky, unlettered wretch that drags the chain of bondage through the weary round of life, with no other privilege than that of existing for another's benefit, should have been intended by Heaven for their equal, they will not believe. But let me appeal to the intelligent mind and ask in what respect are they our inferiors? Though they have never been taught to tread the paths of science or embellish human life by literary acquirements; though they cannot soar into the regions of taste and sentiment or explore the scenes of philosophical research, is it to be inferred that they want the power, if the yoke of slavery did not check each aspiring effort, and clog the springs of action? Let the kind hand of an assiduous care mature their powers, let the genius of Freedom ex-

cite to manly thought and liberal investigation; we should not then be found to monopolize the vigor of fancy, the delicacy of taste, or the solidity of scientific endowments. Born with hearts as susceptible to virtuous impressions as our own, and with minds as capable of benefiting by improvement, they are in all respects our equal by nature; and he who thinks otherwise has never reflected that talents, however great, may perish unnoticed and unknown, unless auspicious circumstances conspire to draw them forth, and animate their exertions in the round of knowledge.

As well might you expect to see the bubbling fountain gush from the burning sands of Arabia, as that the inspiration of genius or the enthusiastic glow of sentiment should rouse the mind which has yielded its elasticity to habitual subjection.

Thus the ignorance and vices of these wretches are solely the result of situation, and therefore no evidence of their inferiority. Like the flower whose culture has been neglected and perishes amidst permitted weeds ere it opens its blossoms to the spring, they only prove the imbecility of human nature unassisted and oppressed.

Well has Cowper said,

‘ ’Tis liberty alone which gives the flower
Of fleeting life its lustre and perfume,
And we are weeds without it.’

Charles Sumner characterized this speech as “of earnest, truthful eloquence—better for his memory than even his professional fame.”⁶ and Pinkney himself thirty-one years afterward seems to have been rather proud of it. In 1820 the Quakers sent a copy of it in pamphlet form to the members of the two houses of Congress, including himself, and he writes, “After a hasty perusal of it, I think it will

⁶ Works of Charles Sumner, vol. III, 118, 119.

not disgrace me; and I should not care if they would think it worth while to republish it."

For the records of his legal achievements during this period, we must look to the early Maryland Reports of "Harris and McHenry," where, especially during the years from 1793 to 1796, we find many evidences of his large and important practice and of his exceptionally high standing at the bar for so young a man. In one volume of these reports⁷ Pinkney appears in twenty-three cases, in about two-thirds of which his side was successful. In 1793 in the case of *McFadon vs. Martin*,⁸ Pinkney appears as counsel against the redoubtable Luther Martin, then Attorney-General, seeking to hold Martin on a single bill given by him. Martin apparently had a good defense, but was caught napping in not having complied with some statutory provisions. Pinkney's client lost in the General Court, but Pinkney induced the Court of Appeals to reverse this judgment and give judgment for the appellant.

The abstract of his argument, as given in the reports, shows beautiful logic, close reasoning, and immense confidence in himself, combined with an almost contemptuous disregard of the opinion of the General Court. His argument concluded with these sentences: "Upon the whole, I am at a loss to discover upon what grounds the judgment of the Gen-

⁷ 3 Harris and McHenry's Reports.

⁸ 3 Harris and McHenry's Reports, 153.

eral Court can be countenanced. It appears to me to be so plainly erroneous that it is on that account difficult to argue against it." Rather strong language this, from a young man not yet thirty years old. In the same year (1793) in the case of *Murray vs. Ridley*,⁹ the Reporter gives "Pinkney's notes in the case of *Fitzimmer vs. Redgate*" as apparently a full justification for the General Court's decision in the reported case. In 1797, in the case of *Davidson vs. Beatty*,¹⁰ Mr. Pinkney's "notes" appear set out at large as part of the argument of the case, although, as explained by the Reporter in a note, Mr. Pinkney had, at the time of argument, left the country on his first foreign mission. In 1798 in the case of *Griffith vs. Griffith*¹¹ the "Opinion" of William Pinkney who was "absent on a mission to Great Britain when this case was argued" is published in full in the report of the case. So, in 1799, in the case of *Tubman vs. Anderson*,¹² where a case decided by the Chancellor and appealed to the Court of Appeals is reported, Pinkney's argument delivered before the Chancellor is published alongside of the arguments delivered by the other counsel in the Appellate Court.

Pinkney's great case in this first period of his professional life was *Martindale vs. Troop*,¹³ argued in

⁹ 3 Harris and McHenry's Reports, 171.

¹⁰ 3 Harris and McHenry's Reports, 594.

¹¹ 4 Harris and McHenry's Reports, 101.

¹² 4 Harris and McHenry's Reports, 357.

¹³ 3 Harris and McHenry's Reports, 270.

1793, to which Wheaton refers as "a specimen of the accuracy and depth of his legal learning and of his style and peculiar manner of reasoning on technical subjects."¹⁴ The question there was, whether, after an exclusive and adversary possession of land for more than twenty years against a tenant in tail, the entry of the issue in tail is barred by the Statute of Limitations. Pinkney's argument on this point covers forty-eight pages of the printed report, and, although apparently somewhat diffuse, is brilliant, luminous, learned, convincing, and withal exceedingly characteristic of the man. It is impossible to forbear quoting three sample sentences.

In the first there is revealed the devotee of Coke, Littleton, and Hargrave:

Again, the feoffment of tenant in tail left the title to the inheritance untouched, and the descent of the tail in the order prescribed unimpeached; but it took away the entry of the issue *in infinitum* until the tail should be recontinued by the *droitural* action of *formedon in the descender*."

In the second appears the skilfully arguing advocate:

The Statute 21 James I. is to be taken liberally in advancement of its object.

But if this Statute is thus so to be construed, it is natural to ask why it is that heirs in tail are to be sheltered from its operation, when the words of it are calculated to embrace them?

Upon what ground of political or legal propriety is it that in modern times estates tail, reprobated by our laws, condemned by every country in the world which commerce has enlightened, and uniformly discountenanced by English judicatures from Talta-

¹⁴ Wheaton's, *Life of Pinkney*, p. 25.

rum's case to the present day, are all at once to be taken under the peculiar guardianship of our courts of Justice so as to be rescued by casuistical constructions and fine-spun imaginations from the effects of an Act of Parliament, passed for the wisest and most beneficial purposes, whose comprehensive language plainly includes them, and within whose mischief they indisputably fall; to say nothing of the laws of Maryland, which have long since, as well as recently, endeavored to unfetter them, as inconsistent with our circumstances, inimical to our commercial progress, and irreconcilable with the genius of our people and government.

In the third and last quotation appears Pinkney, the self-confident youth of thirty, who thus speaks in regard to a question decided contrary to his contention by the General Court of his State:

It only remains for me to add, that I know of no direct determination of the principal question in the case. The reason, I believe, is, that it has never been doubted, until it was lately doubted in Maryland; and that it never will be doubted elsewhere. One might as well search for formal decisions on the question whether the oldest son is heir to his father. If opinions are asked of English lawyers on this point (and they have been asked), the answer is invariable, that they never heard a question made on it, or supposed it was possible; that it is the received idea in Westminster Hall that issue in tail is barred by limitations precisely as an heir in fee; but that as the law was never disputed, it has never been solemnly adjudged. It may, however, be confidently urged, on the other hand, that no *dictum*, in Court or out of Court, no hint or suggestion can anywhere be found in any law book good or bad, to give the slightest color to the opposite doctrine.

Evidently the opinion of the General Court, when it was wrong, had no more controlling influence with Pinkney at thirty, than had the toryism of his father with the same Pinkney at twelve. Pinkney's

argument was successful, and "at June Term 1796 the Court of Appeals reversed the judgment of the General Court" without dissent.

Pinkney spent eight years of his life in England acting as Commissioner, under a clause in the Jay treaty providing that the British Government should render "full and complete compensation in certain cases of irregular or illegal capture or condemnation" of vessels by the English Government, the amount of which compensation was to be determined by the Board of which he was a member.

In this service he fully maintained and increased the reputation which he had already acquired. Many interesting questions came before the Board respecting the law of contraband, domicile, blockade, the practice of the prize courts, the extent of its own jurisdiction, and the interpretation of the treaty under which it was constituted.

Some of Mr. Pinkney's written opinions on these subjects are preserved to us by Mr. Wheaton, who calls them—and justly calls them—"finished models of judicial eloquence, uniting powerful and comprehensive argument with a copious, pure and energetic diction."¹⁵ He seems to have mastered Vattel, Grotius, Burlamaqui, and the other authorities on International law with the same thoroughness as he had previously mastered Coke, Littleton, and the Year Books, and he is able to quote them as full and as pertinently.

¹⁵ Wheaton's, *Life of Pinkney*, pp. 193-371.

Of course it is impossible here to give any abstract of, or extract from, these opinions that will fairly illustrate his style or suggest his power. One characteristic, however, of his arguments throughout his whole career, was the unmerciful way in which he would pounce down upon some weak point or careless argument of his adversary, and remorselessly hold it up as a target, while he riddled it with his logic. This may perhaps be illustrated by a paragraph from his written opinion in the case of "*The Betsy*." ¹⁶

Dr. Nicholl—one of the British commissioners—having stated in his opinion that "the trade itself" in which "*The Betsy*" was engaged "was barely not illegal," Pinkney thus replies:

It is also said, 'That the trade in which the vessel was engaged was barely not unlawful,' and this is suggested as proper to influence the quantum of compensation. But if the trade was not unlawful, it was surely as lawful as any trade can be. I know of no mode by which the absolute legality of a trade can be proved in reference to the law of nations, but by showing that this law does not prohibit it. Such, it is admitted, was the trade in which "*The Betsy*" was employed, and I cannot conceive how any trade can be said to be lawful in any other sense. If the trade was lawful at all, it was completely so; and of course was entitled to security as far as any trade could be so entitled. There is no medium between legality and illegality. It is true there are certain illegal acts more injurious and more wicked than others, and consequently requiring and justifying heavier punishment—but it is incomprehensible how an act, confessedly legal, can ever be

¹⁶ Wheaton's, *Life of Pinkney*, p. 274.

the object of punishment upon a loose idea that it was *barely* not *unlawful*.¹⁷

There will be noticed in this extract, besides the almost cruel pulverizing of his opponent's argument, an entire absence of the somewhat florid ornamentation which characterized his earlier arguments and speeches. In this, it is simply typical of all the "opinions" published by Wheaton as given by Pinkney in his capacity as Commissioner. There is much close reasoning, but there are no flowers.

Pinkney evidently was the master-spirit upon the Board, and seems to have scored an almost continuous triumph over his opponents. Causes beyond his control, however, protracted the sessions and interrupted the proceedings of the commission, and Pinkney became restless and anxious to return home. In 1799 he writes, "I begin to languish for my profession." "My time is always filled in some way or other: but I think I should be the better for a speech now and then." As a matter of fact, he was assiduously cultivating himself, and improving every opportunity to qualify for the highest position and best rewards which were to be had at the American bar. He was, by virtue of his office, brought into immediate contact with those Englishmen who were then most eminent as "Civilians," and particularly enjoyed the society of Sir William Scott. He heard some of Mr. Erskine's great arguments, and was in the constant habit of attending the debates of Parlia-

¹⁷ Wheaton's, *Life of Pinkney*, p. 274.

ment. "He employed his leisure hours in endeavoring to supply what he now found to be the defects of his early education, by extending his knowledge of English and classical literature. He devoted peculiar attention to the subject of Latin prosody and English elocution, aiming above all to acquire a critical knowledge of his own language—its pronunciation—its terms and signification—its synonyms—and, in short, its whole structure and vocabulary. By these means, he added to his natural facility and fluency, a copiousness and variety of elegant and appropriate diction, which graced even his colloquial intercourse, and imparted new strength and beauty to his forensic style."¹⁸ He seems to have rather understated than exaggerated the fact, when he says in a letter dated August 27th, 1800, "it is not of small importance to me that I shall go back to the bar cured of every propensity that could divert me from business—stronger than when I left it—and, I trust, somewhat wiser. In regard to legal knowledge, I shall not be worse than if I had continued. I have been a regular and industrious student for the last two years, and I believe myself to be a much better lawyer than when I arrived in England. There are other respects too in which I hope I have gained something—how much my friends must judge."

An anecdote, which he used himself to tell, is interesting as illustrating the resolution and firmness of purpose with which he devoted himself to the ac-

¹⁸ Wheaton's, *Life of Pinkney*, p. 45.

quisition of any branch of knowledge in which he found himself deficient, and which he deemed it desirable to possess. During his residence in England at this time, some question of classical literature was discussed at table in a social party where he was present, and the guests, in turn, gave their opinion upon it. He was silent for some time, and, when an appeal was made to him for his opinion, he had the mortification of being compelled to acknowledge that he was unacquainted with the subject. To avoid a repetition of such an incident, which to a man of his temperament was peculiarly mortifying, he at once resumed his classical studies, and actually put himself under the care of an instructor for the purpose of reviewing and extending his acquaintance with the ancient literature.¹⁹

In short, he regarded this period of his diplomatic service an additional course of training for his career at the bar. In 1803 he writes:

At the bar I must contrive as well as I can, for I must return to it. I have no alternative; and if I had, choice would carry me back to the profession. I do not desire office, although I have no such objections to the present administration, as, on what are called party principles, would induce me to decline public employment. *It is my wish to be a mere professional laborer, to cultivate my friends and my family, and to secure an honorable independence before I am overtaken by age and infirmity.*

As in the case of Solomon's choice of wisdom, his wish was gratified, and the lesser good, which he did not desire, was added to it.

¹⁹ William Pinkney, in Spark's Library of American Biography, p. 74.

Two letters written by Pinkney during this stay in England, throw an interesting light upon the customs of the time, and show him contributing his share to that infernal "pavement," which is said to be formed by the making and breaking of good resolutions. On April 26th, 1799, he writes:

I ought to have good health, for I take pains to acquire it; and have even gone so far as to abandon the use of tobacco, to which I was once a slave. It is now about eighteen months since I have tasted this pernicious weed; but I did not forbear the use of it solely on account of my health; I found that it was considered here as a vulgar habit, which he who desired society must discard.

But Alas! on February 14th, 1880, he writes to the same correspondent:

Pray can you make out to send me a box of Spanish cigars? If you can, I will thank you: For I find it beneficial to smoke a cigar or two before I go to bed. This I do by stealth, and in a room devoted to that purpose; for smoking here is considered a most ungentlemanlike practice. Having left off chewing tobacco, which was prejudicial to me, I have taken up the habit of smoking, to a very limited extent, in lieu of it; and, as I find it serviceable to me and *nobody knows it*, I think I shall continue it.

We admire William Pinkney at a distance, when we contemplate him at the age of forty studying again his Latin grammar and classical reading. But our heart warms to him as to a friend and brother, when we see him finding it so "beneficial to smoke a cigar or two" before he goes to bed, that he will do it, even though he knows tobacco to be a "pernicious weed," and even though he must do his smoking "by stealth."

Upon Mr. Pinkney's return from England he plunged with renewed ardor into the duties of his profession, and resumed his place at once as leader of the Maryland bar. In 1805 he was appointed Attorney-General of Maryland, which office he accepted at a personal sacrifice, inasmuch as he gave all of its emoluments to a friend, and, by reason of his position was prevented from being retained against the State. The most interesting case tried by Mr. Pinkney during this portion of his career which is to be found reported in the reports of the Court of Appeals of Maryland is the case of *Luther Martin vs. The State*.²⁰ Luther Martin, as Attorney-General, had received a fee to which the Court determined that he had no right, and an indictment was found against him, upon which Martin was fined five pounds current money and costs. To reverse this judgment, Martin brought the appeal. Mr. Pinkney's argument, as abstracted in the Report, is apparently so indicative of some of his leading characteristics, as to make irresistible the temptation to quote a part of it, as follows:

He would not, he said, long trespass on the patience of the Court, which had been already so severely taxed by the long, though learned, argument of the Attorney-General whose speech, however, was distinguished by these two qualities, that of being remarkably redundant, and remarkably deficient. He had resorted to authorities without number to support principally what nobody denied, and abandoned the field of fair argument.

²⁰ 1 Harris and Johnson's Reports, p. 721.

He acquits the Attorney-General of all criminal motives. No man is better acquainted with his generosity and utter negligence in pecuniary concerns. No doubt he received the fee under an entire conviction that he had a right to it. The honor of the Attorney-General is not in question. He must stand upon a legal bottom. Upon the last only we are at issue.

The Court of Appeals sustained Pinkney's contention, and Luther Martin had to pay the fine.

In this period, Pinkney, with Luther Martin for his colleague, argued his first reported case in the Supreme Court of the United States, on appeal from the Circuit Court for Maryland, *Manella vs. Barry*,²¹ February Term, 1806; a case which grew out of the unsettled condition of the foreign commerce of that time, arising from the Napoleonic wars. The arguments in the case received special praise from Chief-Justice Marshall, and Pinkney's side won.

But Mr. Pinkney was not to stay long in this country. England, then in the midst of her long, desperate struggle with Napoleon, adopted measures which seemed to violate many rights which had hitherto been conceded to neutral shipping; the commerce of America suffered in particular, and the friction developed by these annoyances finally resulted in our War of 1812. In 1806 there were many Memorials presented to Congress from the commercial cities of the Union, protesting against these British pretensions. Mr. Pinkney drew up a Memorial from the merchants of Baltimore; and this

²¹ 3 Cranch's Reports, 415.

document, by reason of the thorough acquaintance with the subject therein displayed, the cogency and force of its argument, and the wealth of its learning, combined, perhaps, with the reputation as a diplomat which he had gained during his former residence in London, led directly to his appointment by Mr. Jefferson—although Pinkney had never allied himself with Jefferson's party—as Minister Extraordinary to treat with the British Cabinet on the subjects then in dispute between the two countries.

Pinkney accepted his appointment, and again took up diplomatic work. The abandonment of his practice was a real sacrifice upon his part to patriotism, and he was deeply pained at unfavorable comments which his action provoked from certain strict Federalists, who could see nothing more in his action than a desertion of his friends in an undue eagerness to obtain office.²²

It was a hard task which was given to Mr. Pinkney; and the advent of Mr. Canning into the British Foreign Office, and the attack on our frigate *Chesapeake* by the British frigate *Leopard* in June, 1807, made the situation still more difficult. Mr. Monroe returned to this country in 1807, and Mr. Pinkney was appointed in his place Minister Resident at London. Before long, the war cloud was discernible, rising above the horizon. In a letter dated June 24th, 1808, Mr. Pinkney thus sums up the situa-

²² Letter to Mr. Cooke, October 5th, 1806, Wheaton's, *Life of Pinkney*, p. 51.

tion which was one of respect for the Minister, but not for the country he represented.²³

The most friendly dispositions are constantly professed by ministers, and I am quite sure that they are averse from a war with us; yet the King's speech will satisfy you that there is no present intention of yielding anything to our claims. In their treatment of myself personally, there is every manifestation of kindness and respect for our country. My reception on the birthday and at Mr. Canning's dinner in the evening were such as I would have had reason to be perfectly satisfied with at any time. It has been mentioned to me, however, by a friend on whom I have great reliance, that Mr. Perceval, in a late conversation, observed, that, although they did not wish and would not seek a war with the United States, yet, if we made such a war necessary, they would not, perhaps, much regret it, as a check to our maritime growth was becoming indispensable.

When one party to a diplomatic struggle entertains such sentiments as these, the greatest diplomat that ever lived could not do much upon the other side, and it is small wonder that Pinkney felt that he was accomplishing little of what he desired. In 1808 he endeavors to console himself with the reflection that he was laying in a good stock of that "moral health, which crosses, and difficulties and disappointments, tend very much to promote."²⁴

He did not satisfy his critics in this country, his salary was not equal to his necessary expenditures, by 1809 he had grown restive, and by August, 1810, he was urgently pressing Mr. Madison to be re-

²³ Wheaton's, *Life of Pinkney* p. 81.

²⁴ Wheaton's, *Life of Pinkney*, p. 95.

called.²⁵ He continued, however, still to enjoy the confidence of the President, and remained at his post until in February, 1811, in pursuance of the President's instructions, he demanded an audience of leave. Upon this occasion he stated to the Prince Regent the grounds on which it had become his duty to take his leave, expressed his regrets that his efforts to set to rights the embarrassed and disjointed relations of the two countries had wholly failed, and that he saw no reason to expect that the great work of reconciliation was likely to be accomplished through any other agency. He set sail soon afterward, and arrived at Annapolis in June, 1811.

Mr. Pinkney was now at his prime. He was forty-seven years old, with every power developed, with exceptional endowments cultivated to the highest degree under most favorable conditions, and with an overmastering ambition. With all the enthusiasm of his nature he again took up the practice of the law. In September, 1811, he was elected a member of the senate of the state of Maryland, and in the following December he was appointed Attorney-General of the United States. The reports, both of the United States Supreme Court and the Maryland Court of Appeals, are full of the cases which he tried and the arguments which he made. The volume known as 8th Cranch Reports, containing the records of the United States Supreme Court for the terms of 1812 and 1813, contains forty-six

²⁵ Wheaton's, *Life of Pinkney*, p. 101.

cases where the names of counsel are given, and in exactly one-half of them William Pinkney appears on the one side or the other. He is still as self-confident and sure of the correctness of his own opinions as ever. In *Schooner Exchange vs. McFadon*, he says:²⁶

This Court will not decide this case upon the authority of the slovenly treatise of Bynkershœck or the ravings of that sciolist Martins, but upon the broad principles of National law and National independence.

One of the most celebrated cases in which Mr. Pinkney was concerned—*The Nereide*—²⁷ was argued in the Supreme Court in 1815. A Mr. Pinto, a native and resident merchant of Buenos Ayres, being in London in 1813, chartered the armed and commissioned ship, the *Nereide*, to carry his goods to Buenos Ayres, and took passage on board the vessel, which sailed under British convoy. The *Nereide*, having been separated from the convoying squadron, was captured after a short action by the United States privateer, the "*Governor Thompkins*," and taken to the port of New York.

Pinkney's argument was addressed mainly to the point, that, when a neutral charters an armed ship of a belligerent to carry his goods, he "voluntarily identifies his commerce and himself with a hostile spirit, and authority, and duty known to, and uncontrollable by him." He argues:

²⁶ 7 Cranch's Reports, 135.

²⁷ 9 Cranch's Reports, 430.

The boundaries which separate War from Neutrality are sometimes more faint and obscure than could be desired; but there never were any boundaries between them, or they must all have perished, if Neutrality can, as this new and most licentious creed declares, surround itself upon the ocean with as much of hostile equipment as it can afford to purchase, if it can be set forth upon the great commerce of the world, under the tutelar auspices, and armed with the power of one belligerent, bidding defiance to, and entering the lists of battle with, the other, and at the same moment assume the aspect and the robe of peace, and challenge all the immunities which belong only to submission. . . .

I entreat your Honors to endeavor a personification of this motley notion, and to forgive me for presuming to intimate, that if, after you have achieved it, you pronounce the notion to be correct, you have gone a great way to prepare us, by the authority of your opinion, to receive as credible history, the worst parts of the Mythology of the Pagan world. The Centaur and Proteus of antiquity will be fabulous no longer. The prosopopeia, to which I invite you is scarcely, indeed, within the power of Fancy even in her most riotous and capricious mood, when she is best able and most disposed to force incompatibilities into fleeting and shadowy combination, but if you can accomplish it, it would give you something like the kid and the lion, the lamb and the tiger, portentously incorporated, with ferocity and meekness co-existent in the result, and equal as motives of action. It would give you a modern Amazon, more strangely constituted than those with whom ancient fable peopled the borders of Thermidon — her voice compounded of the tremendous shout of the Minerva of Homer, and the gentle accents of the shepherdess of Arcadia — with all the faculties and inclinations of turbulent and masculine War, and all the retiring modesty of the virgin Peace. We shall have in one personage the pharetrata Camilla of the *Æneid*, and the Peneian maid of the *Metamorphoses*. We shall have Neutrality, soft and gentle and defenceless in herself, yet clad in the panoply of her warlike neighbors — with the frown of defiance upon her brow, and the smile

of conciliation upon her lips — with the spear of Achilles in one hand and a lying protestation of helplessness unfolded in the other. Nay, if I may be allowed so bold a figure in a mere legal discussion, we shall have the branch of olive entwined around the bolt of Jove, and Neutrality in the act of hurling the latter under the deceitful cover of the former."

This extract gives an idea of the ornateness and exuberance of the language of the exordium. The learning and the acuteness, the nice distinctions and the powerful reasoning of the main argument cannot be illustrated by an extract. Mr. Pinkney lost his case, but by his oration—as observers noticed was often the case with him, but with no one else—he aroused the rugged Chief-Justice to incorporate into his judicial opinion a little of rhetorical flourish and eloquent diction.

The following is the language of John Marshall, in whose ears, when he wrote, there must have been resounding the sonorous periods of the counsel at the bar:

With a pencil dipped in the most vivid colors, and guided by the hand of a master, a splendid portrait has been drawn, exhibiting this vessel and her freighter as forming a single figure, composed of the most discordant materials of Peace and War. So exquisite was the skill of the artist, so dazzling the garb in which the figure was presented, that it required the exercise of that cold investigating faculty which ought always to belong to those who sit on this bench, to discover its only imperfection,—its want of resemblance.

The Nereide has not that Centaur-like appearance which has been ascribed to her. She does not rove over the ocean, hurling the thunders of war, while sheltered by the olive branch of peace.

She is not composed in part of the neutral character of Mr. Pinto, and in part of the hostile character of her owner. She is an open and declared belligerent, claiming all the rights, and subject to all the dangers, of the belligerent character. She conveys neutral property which does not engage in her warlike equipments, or in any employment she may make of them; which is put on board solely for the purpose of transportation, and which encounters the hazards incidental to its situation, the hazard of being taken into port, and obliged to seek another conveyance, should its carrier be captured.

In this, it is the opinion of the majority of the Court, there is nothing unlawful.

Mr. Pinto, accordingly, obtained a decree for his property; and those lawyers of a later generation, who may think that they have had similar trials, can console themselves with the thought that Pinkney's master effort failed to obtain him the chief reward that he sought—a decision in his favor—and was successful only in drawing from the Court a somewhat doubtful compliment.

During this period, Mr. Pinkney's efforts were not confined alone to the United States Courts. In almost every important case in the State Courts of Maryland, he appears as counsel, trying thirty-three cases of those reported in the two volumes known as 3d and 4th Harris and Johnson. In one of these cases he appears as doing an exceptionally courageous and, perhaps, unprecedented thing. In *Coale vs. Mildred's Lessee*,²⁸ the Court of Chancery had given the decision in favor of his client. The point was made,

²⁸ 3 Harris and Johnson's Reports, 278.

on appeal, that not all the proper parties were before the Court. Mr. Pinkney, being convinced that the point was well taken, did not even attempt to sustain the decree, but admitted that proper parties had not been made, and consequently allowed the decree to be reversed, an action which indicates what was his professional feeling, his devotion to the higher ideals, and his scorn of pettifogging devices.

In 1814 a bill was introduced into the House of Representatives which required the Attorney-General to reside at the seat of Government, and Mr. Pinkney, feeling that it would be incompatible with his other professional engagements to live in Washington, resigned his office, much to the regret of President Madison.

Pinkney was a warm supporter of the War of 1812 and of Madison's administration. He was elected to the command of a volunteer corps which was raised in Baltimore for local defense, marched with his men to Bladensburg at the time of the attack upon that city by General Ross, fought with gallantry at the battle of Bladensburg, and was there severely wounded. When peace was declared, the citizens of Baltimore held a public meeting, at which an address to President Madison was adopted, which was drawn up by Pinkney, and may be considered as embodying his personal views as to the War. Its tenor may be seen by the following extract:

The struggle has revived, with added lustre, the renown which brightened the morning of our independence. It has called forth

and organized the dormant resources of the empire: It has tried and vindicated our Republican constitution: It has given us that moral strength which consists in the well-earned respect of the world, and in a just respect for ourselves. It has raised up and consolidated a national character, dear to the hearts of the people, as an object of honest pride and a pledge of future union, tranquillity, and greatness.

It has not, indeed, been unaccompanied by occasional reverses; yet even these have their value, and may still be wholesome to us, if we receive them as the warnings of a protecting Providence against the errors of a false confidence, and against intemperate exultation in the midst of more prosperous fortune.

Before Pinkney had resigned from the military command, he had been elected to the United States House of Representatives, and here he made his great speech upon the Treaty-making power under the Constitution. In 1815 a Commercial Convention between the United States and Great Britain, stipulating for the mutual abolition of discriminating duties, was signed at London, and afterwards ratified by the President and Senate. Subsequent to the ratification, a bill was introduced into the House of Representatives to carry its provisions into effect. The supporters of the Bill maintained that, although the Treaty-making power was lodged by the Constitution in the President and Senate, without express exception, yet, as the power to regulate commerce was given to Congress, a treaty regulating commerce exclusively must be held to be an implied exception, and to fall within the jurisdiction of Congress as a whole. Mr. Pinkney's argument against

this view is a masterpiece, and again it is impossible to resist the temptation to quote a few sentences, although any short quotation will fail to do justice to the speech as a whole. Mr. Pinkney said:

I reason thus then upon this part of the subject. It is clear that the power of Congress, as to foreign commerce, is only what it professes to be in the Constitution, a legislative power, to be exerted municipally, without consultation or agreement with those with whom we have an intercourse of trade; it is undeniable that the Constitution meant to provide for exercise of another power relatively to Congress, which should exert itself in concert with the analogous power in other countries, and should bring about its results, not by statute enacted by itself, but by an international compact, called a treaty; that it is manifest, that this other power is vested by the Constitution in the President and Senate, the only department of the Government which it authorizes to make any treaty, and which it enables to make all treaties; that if it be so vested, its regular exercise must result in that which, as far as it reaches, is law in itself, and consequently repeals such municipal legislations as stand in its way, since it is expressly declared by the Constitution that treaties regularly made shall have, as they ought to have, the force of law.

It is suggested again, that the treaty-making power (unless we are tenants in common with the President and Senate, to the extent at least of our legislative rights) is a pestilent monster, pregnant with all sorts of disasters! — It teems with ‘Gorgons, and Hydras, and Chimeras dire!’ At any rate, I may take for granted that the case before us does not justify this array of metaphor and fable; since we are all agreed that the convention with England is not only harmless but salutary. To put this particular case, however, out of the argument, what have we to do with considerations like these? Are we to form, or to submit to, the Constitution as it has been given to us for a rule by those who are our masters? Can we take upon ourselves the office of political casuists, and,

because we think that a power ought to be less than it is, compel it to shrink to our standard? Are we to bow with reverence before the national will, as the Constitution displays it, or to fashion it to our own, to quarrel with that character, without which we ourselves are nothing, or to take it for a guide which we cannot desert with innocence or safety!

In 1816, Mr. Pinkney resigned his seat in Congress, and withdrew for a time from the practice of law to accept another diplomatic appointment, that of Minister Plenipotentiary to the Court of Russia and Special Minister to that of Naples. His reasons for this step are best given by himself in a conversation with one of his friends.

There are those among my friends who wonder that I will go abroad, however honorable the service. They know not how I toil at the bar: they know not all my anxious days and sleepless nights: I must breathe a while: the bow forever bent will break. Besides, I want to see Italy: the orators of Britain I have heard, but I want to visit that classic land, the study of whose poetry and eloquence is the charm of my life; I shall set my foot on its shores with feelings that I cannot describe, and return with new enthusiasm, I hope, new advantages, to the habit of public speaking.

The object of Mr. Pinkney's mission to Naples was to demand from the then Neapolitan government indemnity for the losses which our merchants had sustained by the seizure and confiscation of their property in 1809 during the reign of Murat. In spite of all his efforts, which were both able and strenuous, he was unsuccessful in this matter, and, in accordance with his instructions, proceeded to Russia under consciousness of failure. On October 7th,

1816, before leaving Italy he wrote from Naples to President Monroe:

My health has suffered here. The climate looks well enough, (not better, however, than our own,) but it relaxes and enfeebles much more than ours.

The so much vaunted sky of Italy appears to me (thus far) to be infinitely inferior to that of Maryland. Everything here has been overrated by travellers, except the Bay of Naples, and the number and clamorous importunity of the common beggars, and the meanness of the beggars of a higher order, which it is absolutely impossible to overrate.

After all, our country gains upon our affection in proportion as we have opportunity of comparing it with others.

Although while in Russia, Mr. Pinkney, in the language of a very intelligent observer, stood particularly well with the Emperor, his family and his principal ministers, he very soon became restless in his life there, and before August 16th, 1817, he had requested his recall. The expenses involved in diplomatic service made him feel that he was spending what ought to be reserved for old age, and even then he was obliged to omit the giving of the splendid entertainments and the social functions, which ambassadors from other countries felt to be a part of what was expected of them. The practice of the law was realized by him as the sphere for which he was peculiarly qualified, and on January 21st, 1818, he wrote to President Monroe, expressing his unwillingness to serve either as Minister to England or as Attorney-General of the United States, stating, evidently in all sincerity, "I do not want office, but

I prize highly your esteem. *My desire is to be a mere lawyer.*"

When Pinkney returned from Russia, there was no man at the bar who could be compared with him in point of professional standing. It is interesting to note how large his figure loomed up even to the mind of William Wirt, himself one of the tallest breed of legal giants, and fully realizing—if not doing more than justice to—his own powers. Wirt, then Attorney-General, writes to his friend Pope, October 13th, 1818:²⁹

I expect to go to Baltimore again early next month, and to have another battle with Glendower Pinkney. 'The blood more stirs,' you know, 'to rouse the lion than to start the hare.' A debate with Pinkney is exercise and health. . . . I find much pleasure in meeting him. His reputation is so high that there is no disparagement in being foiled by him, and great glory in even dividing the palm.

When the highest law official in the country felt thus, it gives us no wonder to find a friend writing of him as one whom "the general voice" has placed "at the head of the great men of our country."³⁰ He was not fated to remain long a "mere lawyer," for he was elected, soon after his return, to the United States Senate, taking his seat in that body January 4, 1820, and holding that position until his death a few years later.

Out of the many incidents that a biographer might

²⁹ Kennedy's, *Life of William Wirt*, vol. II, 80.

³⁰ Wheaton's, *Life of Pinkney*, p. 158.

relate concerning this period of his life, there is space in this essay to allude only to four, his two legal arguments in the United States Supreme Court in the cases of *McCulloh vs. Maryland* and *Cohens vs. Virginia*, his legal argument in the Maryland Court of Appeals in the case of the *State vs. Buchanan*, and his speech in the United States Senate upon the measure known as the "Missouri Compromise."

In the year 1819 the case of *McCulloh vs. Maryland*,³¹ was argued in the Federal Supreme Court; a case which has, perhaps, done more to vivify and strengthen our National Government than any measure ever passed by Congress. The United States Government had chartered the National Bank. The State of Maryland imposed a tax upon it. The Maryland Court of Appeals sustained the State Law, and gave judgment against the Bank for the penalties imposed by the State Law for not paying the tax.

Mr. Pinkney gave his opinion that the State taxing law was unconstitutional, and, when the case came on for trial, he was retained by the Bank to argue in support of that opinion. Daniel Webster and William Wirt were his colleagues. Hopkinson, Jones, and Luther Martin were opposed to him. But *the speech* was made by Pinkney, who occupied three days in its delivery. In his exordium, after alluding to the importance of the cause, being, as it

³¹ 4 Wheaton's, Reports, 316.

was, a contest between the conflicting claims of State Sovereignty on the one hand and National Sovereignty on the other, he says:

I meditate with exultation, not fear, upon the proud spectacle of a peaceful review of these conflicting sovereign claims by this, more than Amphictyonic, Council. I see in it a pledge of the immortality of the Union, of a perpetuity of national strength and glory, increasing and brightening with age: — of concord at home and reputation abroad.

Speaking of the dire results prophesied by counsel upon the other side, as certain to come if the states were not allowed the power claimed for them, he says:

These miserable *State Jealousies*, which the learned counsel seems, in the language of Milton, to consider as ‘hovering angels, girt with golden wings’ — but which, in my estimate of their character, attended like *Malignant Influences* at the birth of the Constitution, and have ever since dogged the footsteps of its youth — may be said to have been summoned by him to testify in this cause, to give to this Court their hysterical apprehensions and delirious warnings, to affect our understandings with the palsy of fear, to scream us, as it were, into a surrender of the last, the only fortress of the common felicity and safety, by capitulating with these petty views and local feelings which once assailed us, in the very cradle of our independence, as the serpents of Juno assailed the cradle of Hercules, and were then upon the point of consigning us to everlasting perdition.

When principles, such as I have just adverted to, are announced from a quarter, which everything that is excellent in intellect and morals contributes to make respectable, it is high time that we should be informed by the authentic responses of the appointed oracles of the Constitution, in what spirit that Constitution is to be interpreted: it is high time that we should be made to understand

whether we are already relapsed into the more than infantile feebleness of the Confederacy, or whether we may yet venture to impute to the actual Constitution that manly strength which can alone enable it to become the champion of the general prosperity against all those assaults to which, in the vicissitudes of human affairs, and according to the ordinary lot of human institutions, it cannot fail to be exposed.

Sir, it is in this view that I ascribe to the judgment that may be pronounced in this case, a mighty, a gigantic influence, that will travel down to the latest posterity, and give shape and character to the destinies of this republican empire.

It is not merely that it may stabilitate or pull down a financial or commercial institution called a Bank — however essential such an institution may be to the government and country. I have a deep and awful conviction that upon that judgment it will mainly depend whether the Constitution, under which we live and prosper, is to be considered, like its precursor, a mere phantom of political power to deceive and mock us — a pageant of mimic sovereignty calculated to raise up hopes that it may leave them to perish — a frail and tottering edifice, that can afford no shelter from storms either foreign or domestic — a creature half made up, without heart or brain, or nerve or muscle — without protecting power or redeeming energy — or whether it is to be viewed as a competent guardian of all that is dear to us as a nation.

In these days, we are apt to think it impossible that a strong and virile logic may be combined with elaborate ornamentation of diction; but Pinkney combined them both, and the argument of the speech, in its main lines, is the argument adopted by Chief-Justice Marshall in the opinion, the same method being adopted in each. The effect, thus indicated by Marshall's opinion, was expressed in words by Justice Story, who says, "I never in my

life heard a greater speech. He spoke like a statesman and a patriot and a sound constitutional lawyer. All the cobwebs of sophistry and metaphysics about States' Rights and State Sovereignty, he brushed away with a mighty besom." "It was worth a journey from Salem to hear it."

The case of *Cohens vs. Virginia* is another of the great cases that have established the national supremacy in its proper sphere over States' Rights. Pinkney was one of the leading minds in the preparation of the case, although he died before its final trial on the merits. The main value of the case, however, arises from the points determined on a motion to dismiss the appeal. Upon this, Pinkney's was the main argument. His reasoning in favor of the appellate jurisdiction of the Supreme Court was sustained, and the law then established is one of the bulwarks of the independence and efficacy of the Federal judiciary.

In the Maryland Court of Appeals, Pinkney's great case was that of the *State vs. Buchanan*, where the law of conspiracy was fully considered, and expounded in such a way as to make the case ever since the leading one in Maryland. Pinkney won in the lower Court, but was reversed upon appeal.

In the United States Senate, his speech upon the Missouri question ranks well up in the great legislative efforts of any of our great statesmen. The bill, as it came from the House of Representatives for the admission of Missouri, contained a clause

forbidding the introduction of slaves into the new state. Pinkney's general position was opposed to the bill, insisting that Congress had no power under the Constitution to impose such a condition upon the admission of a state into the Federal Union. The following selections illustrate the general character of the speech made by him:

Perhaps, Sir, you will permit me to remind you that it is almost always in company with those considerations that interest the heart in some way or other, that encroachment steals into the world. A bad purpose throws no veil over the licenses of power. It leaves them to be seen as they are. It affords them no protection from the inquiring eye of jealousy. The danger is when a tremendous discretion, like the present, is attempted to be assumed, as on this occasion, in the names of Pity, of Religion, of National Honor and National Prosperity; when encroachment tricks itself out in the robes of Piety, or Humanity, or addresses itself to pride of country, with all its kindred passions and motives. It is then that the guardians of the Constitution are apt to slumber on their watch, or, if awake, to mistake for lawful rule some pernicious arrogation of power.

Slavery, we are told in many a pamphlet, memorial, and speech, with which the press has lately groaned, is a foul blot upon our otherwise immaculate reputation. Let this be conceded — yet you are no nearer than before to the conclusion that you possess power which may deal with other subjects as effectually as with this. Slavery, we are further told, with some pomp of metaphor, is a canker at the root of all that is excellent in this republican empire, a pestilent disease that is snatching the youthful bloom from its cheek, prostrating its honor and withering its strength. Be it so — yet, if you have power to medicine to it in the way proposed, and in virtue of the diploma which you claim, you have also power, in the distribution of your political alexipharmics, to present the

deadliest drugs to every territory that would become a State, and bid it drink, or remain a colony forever. Slavery, we are also told, is now 'rolling onward with a rapid tide towards the boundless regions of the West,' threatening to doom them to sterility and sorrow, unless some potent voice can say to it—thus far shalt thou go and no farther. Slavery engenders pride and indolence in him who commands, and inflicts intellectual and moral degradation on him who serves. Slavery, in fine, is unchristian and abominable. Sir, I shall not stop to deny that slavery is all this and more; but I shall not think myself the less authorized to deny that it is for you to stay the course of this dark torrent, by opposing to it a mound raised up, by the labors of this portentous discretion, on the domain of others—a mound which you cannot erect but through the instrumentality of a trespass of no ordinary kind—not the comparatively innocent trespass that beats down a few blades of grass, which the first kind sun or the next refreshing shower may cause to spring again—but that which levels with the ground the lordliest trees of the forests, and claims immortality for the destruction which it inflicts.

On the 17th day of February, 1822, Mr. Pinkney was at the height of his fame. Eight days later he was dead: a demise so sudden as to affect the mind of the whole country. Such a death was in accordance with Mr. Pinkney's desires. He had looked upon the old age of Luther Martin—when, bereft of all his powers, he lingered superfluous on the stage—with horror, and had expressed a hope that such a termination of life might not be his. He said that he "did not desire to live a moment after the standing he had acquired at the bar was lost, or even brought into doubt or question." His desire was fulfilled, and the star of his success never showed

dimming of its brilliancy. In the words of William Wirt, "He died opportunely for his fame. It could not have risen higher." The Supreme Court, speaking through Chief-Justice Marshall, the Bar, speaking through Mr. Clay, Mr. Webster and Mr. Harper, both houses of Congress, by resolution, and the heads of the executive departments, and foreign ministers, by the attendance upon the funeral services, all joined to testify to the sense of national loss occasioned by his death. Perhaps never before nor since, in this country, has such a position of national prominence, as was held by him, been attained by any one whose chief honors were won as a "mere lawyer."

Pinkney's main qualities seem to have been his power of intense application, and his desire for applause. It was his intense application to his law books that made him the most learned man of his time, both as to old black letter common law, present day commercial law, and international and public law. It was his intense application to the study of the English language, including the classical sources from which so much of our English is drawn, that gave him his copious diction and appropriate use of figures of speech, and made him, perhaps, the most eloquent man of his age. These are the qualities that make him show up behind the haze of the intervening years as almost more than human.

His desire for applause brings him down to the human level, and, in regard to some of its recorded

exhibitions, gives us the satisfaction of indulging in a superior smile at the great man.

He had a high opinion of his own learning. He is quoted as saying "He considered the late Mr. Chief-Justice Parsons and himself the only men in America who had thoroughly studied and understood Coke on Littleton." A friend of his is quoted as saying, "I never heard him allow that any man was his superior in anything; in field sports, in music, in drawing, and especially in oratory, in which his great ambition rested."

Mr. Wirt, in a letter to Francis W. Gilmer, dated April 1st, 1816, speaking of a cause in which Mr. Pinkney was his antagonist tells a very interesting story. He says:

In the cause in which we were engaged against each other, there never was a case more hopeless of eloquence since the world began. It was a mere question between the representatives of a dead collector and a living one, as to the distribution of the penalty of an embargo bond: — whether the representatives of the deceased collector, who had performed all the duties and recovered the judgment, or the living collector, who came in about the time the money was paid by the defendant into court, and had, therefore, done none of the duties, was entitled to the award. I was for the representatives of the deceased collector — Pinkney for the living one. You perceive that his client was a mere harpy, who had no merits whatever to plead. There were ladies present — and Pinkney was expected to be eloquent at all events. So, the mode he adopted was to get into his tragical tone in discussing the construction of an Act of Congress. Closing his speech in this solemn tone, he took his seat, saying to me, with a smile — 'that will do for the ladies.'

A volume might be written composed of nothing but the opinions of the prominent men of his time concerning Pinkney. They all knew him, and most of them have left some record of their admiration for his greatness; but, so far as legal eminence is concerned, no commendation could add anything to the commendation from Marshall, Taney and Story, with which we began this paper. In this essay, there is only space to give at length Roger B. Taney's remembrance and criticism:

When William Pinkney returned from England, and resumed the practice, the reign of Martin was at an end. Mr. Pinkney had distinguished himself from his first appearance in Court, and, although still a young man when he accepted the appointment of Commissioner under the British treaty, he was already in the foremost rank of the profession; and when he had returned, and had been heard in some important and difficult cases, his supremacy was universally acknowledged. He was a perfect contrast to Martin. He was very attentive to his dress, indeed more so than was thought suitable for his age and station. It approached to dandyism, if it did not reach it. He was always dressed in the extreme of the newest fashion, and, for some time after his return, took notes at the bar and spoke with gloves on, nice enough to wear in a ball-room. His style was metaphorical, but by no means turgid. And, although on some occasions I thought it too ornate, and his metaphors too gorgeous for a legal argument, yet it was impossible not to listen to them with pleasure. They were always introduced at the right time and the right place, and seemed to grow out of the subject of which he was speaking, and to illustrate it. He was fastidiously correct in his language, in its grammatical arrangement, in the graceful flow and harmony of the sentences, and in the correct and exact pronunciation of every word; and I have seen him writhe as if in pain when he was

listening to Martin speak in his slovenly way, in broken sentences, using the most indefensible vulgarisms, and sometimes mispronouncing his words. Mr. Martin seemed indifferent to everything else, provided he impressed upon the Court the idea he wished to convey, while Mr. Pinkney was as attentive to the graceful and ornamental, as he was to the logic of his argument, and, while it was often a labor to listen to Martin, it was impossible not to listen to Pinkney, and to follow him from the beginning to the end of his argument. His arguments were syllogisms, and his points clearly stated and carefully kept separate in the discussion. He came to every case fully prepared, with his arguments and authorities arranged; and no temptation could induce him to speak in a case, great or small, unless he had time to prepare for it; and he argued every one as carefully as if his reputation depended upon that speech; while Martin would plunge into a case when he had not even read the record, relying on the fullness and readiness of his own mind; and, if he found unexpected difficulties, would waste a day in a rambling, pointless and wearisome speech against time, in order to gain a night to look into the case.

Pinkney was a profound lawyer in every department of the science, as well as a powerful and eloquent debater. He always saw the strongest point in his case, and he put forth his whole strength to support it, and enforced it by analogies from other branches of the law. He never withdrew the attention of the Court from this point, by associating with it more questionable propositions obviously untenable. He seemed to regard such arguments as evidence of a want of legal knowledge in the speaker; and, when replying to them, he took particular pleasure in assailing the weaker points, and dwelling on them in a tone and manner that sometimes made the adversary ashamed of them, and sometimes provoked his resentment. There was, however, one defect in his mode of speaking. His voice and manner and intonations did not seem to be natural, but artificial and studied. There were, at intervals, sudden and loud outbreaks of vehemence with impassioned gesticulations, which neither the subject matter nor the

language actually spoken seemed to call for or justify. This want of naturalness in tone and manner was unpleasant to those who heard him for the first time, and impaired the effect of his oratory until you became accustomed to it, and forgot it in attending to the argument. But a man, who, at the age of fifty, spoke in amber-colored doeskin gloves, could hardly be expected to have a taste for simple and natural elocution. His manner was dressed up,—overdressed like his person.

I remember a conversation among some of us, one evening (after we had been listening to Pinkney), in which Mr. Johnson (father of Reverdy Johnson), . . . remarked that those who were not accustomed to hear Pinkney, and had not heard him in a great variety of cases, would not estimate him as highly as he deserved, and would be apt to think we overrated him—that he would leave nothing behind him to compare with the living proofs of greatness which he was daily exhibiting.

The latter part of the remark is undoubtedly true. He wrote nothing worthy of his living fame. His diplomatic correspondence, when published, disappointed those who admired him as a speaker: and he gained no laurels in the discussion with Mr. Canning. He may have been sensible that writing was not his forte. But he was not apt to doubt his power in anything, and whatever may have been the reason, he never wrote out one of his speeches. He delivered two arguments in Congress upon Constitutional questions, which are yet remembered, and which were regarded at the time as among the ablest and most brilliant ever delivered in those halls. One of them was in the House of Representatives on the treaty-making power, and the other in the Senate upon the famous Missouri question. Reporting for newspapers at that day was a very different thing from what it is now, and the newspaper reports of these speeches are utter failures; yet he could not be prevailed upon to write them out. The truth is, he was not a man for the closet. He needed the excitement of the forum, and there was unrivalled.

Besides, I doubt very much whether he set much value on post-

humous fame, as compared with the present enjoyment. He loved honors and distinction, and contended for them, and maintained them, after they were acquired, with unwearied energy. But I am inclined to think he sought and loved them chiefly for the present pleasure they gave him. He was epicurean and self-indulgent in his tastes and habits; and, although far advanced in life, he was evidently ambitious to have the reputation of high fashion and tone, and to be listened to and received as its leader. I am inclined to think he would not have bartered a present enjoyment for a niche in the temple of Fame. He was willing to toil for the former, but made no effort to leave any memorial of his greatness behind him.

The strong impression he made on those who were accustomed to hear him, may, I think, be discovered in the language and style of the opinions delivered in the courts of that period. It will be found, upon looking into them, that in many of the cases argued by him the language of the opinion is more ornate and embellished than usual at other seasons. I speak of opinions delivered in the Supreme Court, as well as in the State Courts. And the remark applies even to some of the opinions of the late Chief-Justice, whose style at other times is not less remarkable for its simplicity and judicial calmness than for its perspicuity and force. Mr. Pinkney's speeches must have been much admired, or his ornamental style would not have been imitated.³²

Little could be said in addition to such a thorough analysis of the man as is above quoted. Chief-Justice Taney's picture of Pinkney's character is photographic in its life-likeness. It nothing extenuates nor aught sets down in malice. It shows us a man, with his fair share of foibles and of human weakness, a man who could not fail to excite much enmity and some sneers, but withal a great man, and the

³² Tyler's, *Memoirs of Roger B. Taney*, p. 69.

greatest lawyer of his time. Like the son of Kish, "When he stood among the people he was higher than any of his fellows from his shoulders and upward," and the bar of Maryland still feels the stimulus of his career, still exults in his honors, and still glories in his fame.

JOHN BOYLE.

JOHN BOYLE.

1774-1835.

BY

GEORGE DURELLE,

ex-Judge of the Court of Appeals of Kentucky.

IF the oldest lawyer in any Kentucky town were asked when the Kentucky Court of Appeals was at its zenith in ability and learning, the probability is that he would pass over the period when George Robertson's splendid, if unjudicial, rhetoric adorned the opinions of the court, and point to the time when Boyle, Owsley and Mills presided at its deliberations. Kentucky was then a young Commonwealth—new-born from the wilderness, its commerce and agriculture developing under conditions untried, its social and political life swayed by elemental hopes and passions, and its citizens in the midst of a strange environment, facing new questions of life and government. It is because of these facts, perhaps, that the books of that period seem fairly to bristle with decisions of new questions and new applications of principles.

When John Boyle was born, October 28th, 1774, at Castle Woods on the Clinch River in Botetourt County, Virginia, it was barely a quarter of a cen-

ture since the first white man had invaded what is now Kentucky. It was but five years since Boone's first visit. In the year of Boyle's birth, the first real settlement was made by the erection of a log house at Harrodsburg. In the year following, the first white women came, and Kentucky was established as a county, carved out of the territory of Fincastle. In 1778 was the first expedition of George Rogers Clarke into the northwest territory.

In 1779, Boyle's father, a small-sized, modest man of Irish stock, who was also named John, and who is said to have been in the Revolutionary Army, and an Indian fighter before that, came to Kentucky and settled at Whitley's Station, in Lincoln County, near the present site of Stanford. He was a captain of Kentucky soldiers in 1780, a fact which argues previous military experience. He had been in Kentucky before 1779, for he was at Boonesboro during its siege, in 1778, by the Canadians and Indians under De Quindre, after which the defenders picked up a hundred and twenty-five pounds of bullets flattened against the cabin walls and palisades. It is also stated that the first peach stones planted in Kentucky were planted by Boyle, in the fall of 1775, about three miles south of Richmond. In 1786 he was commissioned by Patrick Henry, Governor of Virginia, as one of the first justices of Madison County.

The elder Boyle afterwards removed to what is now Garrard County, but the date is uncertain. It

was probably before Kentucky became a state. It is supposed that he came to Kentucky for the purpose of locating a land warrant obtained for military service. In that year, the Virginia legislature adopted a land law, making liberal provisions for settlements and preëmptions "upon western waters," but defective in not providing for surveys under authority of the state. This law, however, started a flood of immigrants who braved the dangers of the wilderness to secure a portion of the fat Kentucky lands. The increase of population was so rapid, that in 1780, Kentucky County was sub-divided into three counties—Fayette, Lincoln, and Jefferson. The danger from Indians was still imminent, and almost continuous. In 1782 occurred Estill's defeat, the siege of Bryant's Station, and the bloody and disastrous battle of Blue Licks, and although no large body of Indians invaded Kentucky after that year, forays by smaller bodies still continued, and depredations were committed and scalps taken until over ten years later.

When the war of Independence closed in 1783, it was supposed that the Indian depredations would cease, and the tide of immigration rose in consequence. But delays in carrying out the treaty provisions, for surrender to the United States of the northwestern posts in the possession of the British, encouraged the Indians to further hostilities. An invasion in force was feared. The existing laws were believed to be inadequate to provide for the

protection of the colonists. No legislation could be obtained except from Richmond, hundreds of miles distant, across mountains and forests occupied at intervals by roving bands of murdering and marauding Indians. Men talked of a separation from Virginia, of forming an independent state government, and of admission to the Confederation. A series of ten conventions was held, beginning, in December, 1784, with one composed of delegates from the militia companies; three acts of the Virginia Legislature were adopted and variously amended; and finally, after the adoption of the Federal Constitution, the movement culminated in the Compact with Virginia, the Act of Congress for the admission of Kentucky as a state, and the assembling at Danville, afterwards the county seat of Boyle County, of the tenth convention, in April, 1792, to frame the first constitution of Kentucky.

It was not without trouble that this peaceful and constitutional result was reached. The people of Kentucky were sorely tempted. The confederation of states was powerless to protect them. The Congress answered their petitions with exasperating delays. They were cut off from their eastern brethren by five hundred miles of wilderness. The Mississippi, the only outlet for their commerce, was in practical control of the Spanish. There were wild rumors that the general government was about to cede the right to navigate the Mississippi for a long term of years. There were more or less delicately

veiled suggestions, coming more or less directly from Spanish officials, that if Kentucky would erect herself into an independent government she might obtain peculiar commercial advantages which Spain would never accord to a member of the Federal Union. There was the constantly recurring friction of the election of delegates to the successive abortive conventions. And through it all there was the continual harrying of the Indian raids and the repeatedly disastrous campaigns against the savages, in which the Government would not let the Kentuckians fight the Indians in their own way, and the Kentuckians would not fight in any other. There can be little doubt that there were good men and patriots who favored the idea of an entirely independent government, and it is certain that the great majority of Kentuckians were warmly against the adoption of the Federal Constitution. Object lessons showing the advantages to be obtained from special commercial privileges at New Orleans were paraded before the eyes of the commercial classes. Whether General Wilkinson was a pure patriot, or a self-seeking demagogue and traitor, he was a man of parts, address and energy, with military fame and a record of courage to win admiration, and gifted with eloquence of the character which most readily gains the applause of the multitude. Even at this day, in the full light of the knowledge which comes after the fact, with the open pages of history showing us what we gained and what we escaped, we can

still feel the force of the arguments adduced by Wilkinson and his associates, and still realize that those who espoused that side of the question may have acted from motives of the highest patriotism, and believed themselves guided by Wisdom that would be justified of her children.

When we consider the circumstances by which the settlers were surrounded and the contumely with which their petitions were treated by the Confederation, and, for a time, by the new government, the wonder is, not that there was a party in favor of separation, but that it was not in the majority. But the ties of blood were too strong in the western pioneers of the purest Anglo-Saxon stock on the continent. The Kentuckians remained true to their brothers across the mountains, and resisted the temptations offered by an alien race and a despotic government.

In this atmosphere young Boyle grew to manhood. In 1792, when Kentucky became a state, he was eighteen years old. Such an environment is likely to make for early maturity and self-reliance. Opportunities for instruction were limited and difficult, but the "Congressional Directory" informs us that he received a "liberal education," and in the best sense of the words, we know that he did. His earliest instruction was obtained from a wandering Irishman who set up a temporary school in the neighborhood. It is recorded that as a little boy he did not take kindly to books, and exhibited no ambition for learning until he overheard the teacher

warning his father that it was a waste of money to send the boy to school. That seemed to fire his soul with determination. In that new country, as was natural, the church, to a great extent, had a monopoly of learning, and a Presbyterian minister, the Reverend Samuel Finley, was his instructor in Latin, Greek, and what were then called the sciences.

We may imagine the interest which the young student took in the dramas which were acted about him: in the guerilla warfare with the Indians; in the debates as to the formation of the new state and the navigation of the Mississippi; in the establishment of the new Federal Constitution; in the schemes of citizen Genêt, ambassador of the French Republic, for military conquest; in the societies formed in imitation of the Jacobin clubs of France, and in Wayne's campaign and victory on the Miami. He was just twenty-one when the Spanish Treaty of 1795 conceded the navigation of the Mississippi and the right of deposit at New Orleans.

He studied law with Thomas Davis, then a member of Congress, and whom he was to succeed as representative for the district. In 1797, he came to the bar and straightway married Miss Elizabeth Tilford, Joseph Hamilton Daveiss being his groomsman, and removed to Lancaster, where for five years he devoted himself to the practice of his profession, taking, nevertheless, considerable interest in public affairs. The year after his marriage he built a two-room log house upon an outlot of the town of Lan-

caster. It is probable that at that time there were very few houses of any other kind in Kentucky. At all events, it is related that in that same house, three other young men began their married life, of whom all followed him as Representative in Congress, one succeeded him as Chief-Justice of the state, and one became Governor of Kentucky. Meanwhile, events were taking place with great rapidity—the Spanish Conspiracy, the Resolutions of 1798, the Constitution of 1800, the election of Jefferson. Kentucky was overwhelmingly Jeffersonian, and in 1802, Boyle was elected to Congress without opposition. He was twice reelected, and declined a unanimous nomination for a fourth term on account of the inadequacy of the salary for the support of a large and growing family. After his election to Congress came the purchase of the Louisiana territory in 1803. Boyle was a Jeffersonian, the friend of Jefferson, and of Clay, when Clay came to the Senate in 1806. He served on the Ways and Means Committee, and was one of the managers assisting John Randolph in the celebrated impeachment proceedings against Judge Samuel Chase. It is probable that his Congressional Service and the impressions of his character and ability for which it gave opportunity, led to the offers of Federal advancement, which came to him later. About the close of his second term came Burr's trial at Frankfort, in which Mr. Clay appeared as counsel after Burr's dramatic but insincere disavowal of the ownership of a single musket, and of any intention

hostile to any of the territory of the United States. It is probable that Boyle was present at the trial.

After his retirement from Congress, President Madison appointed him first governor of the territory of Illinois, and he accepted the position provisionally, but did not qualify. He was essentially domestic in his tastes and a most devoted husband. It was impossible at that time for him to take his family with him to Illinois. Judge Trimble resigned from the Court of Appeals and Boyle on April 1, 1809, was appointed second judge of that court to fill the vacancy, presumably with the expectation of promotion to the chief-justiceship. Ninian Edwards, who was then chief-justice of the court, obtained and accepted the governorship of Illinois; George M. Bibb succeeded him as Chief-Justice, but resigned in less than a year, and Boyle was thereupon, on March 20th, 1810, appointed to the chief-justiceship, which he held until November 8, 1826.

At the time of his appointment he was thirty-five years old and still growing to the maturity of his powers. In personal appearance he was attractive rather than imposing. He was about five feet eight inches in height, rather heavily built, inclining to stoutness in later years, with regular and very expressive features and dark brown eyes and hair. His manner is said to have been charmingly modest, and his talk simple and delightful.

Then began for him a career of distinguished usefulness in his profession. For more than sixteen

years, he occupied a position of the highest honor, dignity and power in the young Commonwealth, and of the greatest influence in directing the lines of growth of its jurisprudence during its formative period. It was an opportunity of the same nature as that which came to John Marshall upon the Supreme Bench of the nation during the formative period of Federal jurisprudence and the first construction of the national constitution. The mere printed record of his work is to be found in the fifteen volumes of Kentucky reports beginning with first Bibb and ending with third Monroe; but a more enduring record exists in the jurisprudence of his state and the honorable traditions of its bench and bar. Such an opportunity comes to few men. No man ever more worthily met the demand of his opportunity. It is a great thing for a man of thirty-five years of age to find a great and congenial life work and to be competent for it. There were offers of what would generally be considered advancement in the line of his profession. It is related that before he left Congress, he was offered by Mr. Jefferson a seat on the Supreme Bench of the nation, and that again he declined the same offer from President John Quincy Adams, made probably on the suggestion of Mr. Clay. Boyle was a man of singularly modest and unassuming nature, but we may well dismiss as apocryphal the suggestion which has been made that he declined these offers because of diffidence respecting his own ability to fill the place worthily. Man is

not given a brain like John Boyle's without knowledge of his gifts. We may assume that his declination was, as the family tradition runs, because of the needs of his growing family and the inadequacy of a salary of nine hundred dollars a year for their proper support and education in Washington. The claims of family were imperative to a husband and father as devoted as Boyle. It is perhaps as well for him and his fame that he devoted his powers to the service of his state; it is certainly better for the state.

When first called to the bench, he had been in the regular practice of the law but five years, to which may be added such practice as he was able to care for during the six years of his congressional service, and the brief period of preparation for admission to the bar. It seems hardly credible that his legal attainments, acquired in such a period and under those circumstances, could have been very extensive in scope. But his knowledge was exact, scientific, ready, and grew with his growth. The principles of the common law and of the common law system of pleading, he understood thoroughly. Robertson, perhaps, the greatest of his successors, suggested that the criticism had been made that he adhered more rigidly to the ancient precedents of the common law than was consistent with its improvement, and its adaptation to the genius of American institutions—that he was not a Mansfield nor a Hardwicke, but more like Hale and Kenyon—but concluded that if

he did not improve, he did not mar, the law. But in the better sense, Boyle was a pioneer of the law. He applied established principles to new facts and adjusted new conditions to the fixed rules of justice. More than any other man in Kentucky, he established the authority and dignity of judicial decision, and was to the jurisprudence of Kentucky what Marshall was to that of the United States.

He was gifted with a peculiarly lucid and pleasing legal style. It was, in most respects, a model of judicial English. It seems to have been his by nature. His touch was sure from the beginning. He was concise without being stiff. Cases are frequent where, in one or two sentences, he stated all of the facts and all of the procedure in the lower court necessary to a perfect understanding of the legal questions involved. Many entire opinions are compressed into the space of from ten to twenty short lines. But he was no slave to conciseness. With all the language at his command, he used all that was necessary to express what he meant. And while in his own phrase, as a professional man he always used appropriate language with technical precision in relation to subjects belonging to his art, he was not above using the expressive vernacular of his day to state a fact; as where, after stating the fear of Indians which existed in a certain locality, he says that some of the inhabitants who staid "forted for their mutual safety and protection;"¹ or where he says that

¹ Hazelrigs vs. Ames, 1 Bibb's Reports, 426.

the evidence is perfectly satisfactory that the defendants "dogged the plaintiff's mare in the pasture of one of the defendants not inclosed with a lawful fence;"² or says that the old rule in slander of construing words in *mitiori sensu* has been "long since exploded and has given way to one which accords more with reason and the common sense of mankind."³

And at times he applied his common knowledge of men and things; as where he disposed of the question whether an application for new trial should have been granted which was based on the absence in the Missouri territory of the sole witness known to the defendant by whom he could prove that the market price of whisky in Mercer County, delivered in good barrels on the river, was only two shillings and six pence a gallon. The Chief-Justice in the course of his opinion said:⁴

And in the next place it is obvious, from the very nature of the thing, either that the fact which the defendant states he could prove by the absent witness was not true, or that he might, with the most ordinary diligence, have discovered other witnesses by whom it could have been established. For it is impossible to believe that the current market price of whisky should not have been diffusively known.

And on proper occasion he could "lumber," as the current phrase of the day went. When wearied by

² Evans vs. Hesler, 1 Bibb's Reports, 561.

³ Logan vs. Steele, 1 Bibb's Reports, 594.

⁴ Ripperdam vs. Scott, 1 Marshall's Reports, 152.

counsel's long and tiresome as well as useless contention against an established rule of common law pleading, he said:⁵

We do not feel disposed to incur the censure of a vain ostentation of learning in citing the numerous authorities which recognize this rule. It is coeval with the science of written pleadings, and its recognition is to be found in every book which treats of the subject of pleas and pleading.

This sounds as if Chief-Justice George Robertson, the most rhetorical of all his successors, might have said it.

He was a common law pleader of the old school and technical to a high degree where technicalities were a part of the logical system necessary to the certainty and effectiveness of the great legal machine; but with fine scorn he swept aside useless technicalities.⁶

Formerly, he said, much ceremony and great prolixity of pleading were used in bringing a suit in chancery to issue. If the defendant, by his plea or answer, offered any new matter in avoidance of the charges in the bill, a special replication was thought to be necessary; to this succeeded the rejoinder of the defendant, by which he asserted the truth and sufficiency of his answer, and traversed every material part of the replication; to the rejoinder the plaintiff might surrejoin; to the surrejoinder the defendant, in his turn, might, rebut, and so on; protracting the pleadings through a labyrinth of forms, calculated greatly to enhance the expense of the litigants, but not, in the slightest degree, conducive to the ends of justice. These idle, but expensive ceremonies have given way to a more rational and intelligible system of pleading.

⁵ Metcalf vs. Standeford, 1 Bibb's Reports, 619.

⁶ Reading vs. Ford, 1 Bibb's Reports, 330.

And again, speaking of the right of one who advanced money for the purchase of land warrants as against any one who purchased the warrants with notice of his claim:⁷

So far as this argument derives any support from the supposed analogy between a right in equity and an estate in fee at law, it is evidently fallacious. Its fallacy consists in the application of a principle merely technical to a species of right founded on the basis of moral justice. The maxim of the old common law, that the freehold could not be in suspense or abeyance, was predicated upon the artificial principles of the ancient system of feuds, and grew out of the necessity, which, according to that system there was of having a tenant always in possession to perform the feudal duties. But this rule has never even in England been applied to estates created by devise, or to conveyances under the statute of uses, which were introduced after the rigor of the feudal system had been in some measure abated. Much less ought it to be applied to a right in equity unknown to that system and founded upon principles of moral justice and general utility.

When precedents failed, he applied rules drawn from an inexhaustible fund of common sense. Observe, for instance, the wisdom of his test of ability to pay, a departure from which has not improved the law of the state:⁸

A promise to pay as soon as the debtor possibly can, is in the contemplation of law a promise to pay presently. The law supposes every man able to pay his debts, and if the ability to pay was a question to be tried, the only practicable mode of trial is per execution, and of this it is not yet too late for the defendant in the court below to have full benefit.

⁷ Patrick vs. Marshall, 2 Bibb's Reports, 43.

⁸ Kincaid vs. Higgins, 1 Bibb's Reports, 397.

Take also this ruling in the case where two states not only claimed but exercised jurisdiction over territory in dispute, and a citizen of Virginia, emigrating to Kentucky with his family and slaves, was induced by fear of the Indians to sojourn for some three years, but without abandoning his intention of proceeding to Kentucky, at a place in the disputed territory, which, when the boundary line was subsequently settled, proved to be several miles within the state of Pennsylvania. His slaves brought an action of trespass, assault and battery and false imprisonment against him for the purpose of ascertaining their right to freedom, and a question of conflict of laws was presented. After the statement of facts, Judge Boyle's opinion proceeds:⁹

That different states or nations have at the same time claimed the empire of one and the same territory, is a circumstance that has not unfrequently happened. But no instance has been found, in the researches the Court have had an opportunity of making, where both nations have been at the same time in possession of the territory in dispute, as was the case of Pennsylvania and Virginia with respect to the territory in which the appellant resided from the spring of the year 1781 until the fall of the year 1783.

By what laws the conduct of the inhabitants of the disputed territory, thus simultaneously possessed by the citizens and officers of two governments having conflicting claims to the sovereignty, ought to be regulated and their rights to be decided, it is important in this case to ascertain. If the laws of Pennsylvania are to furnish the rule of decision in the present controversy, then it is clear that the appellees are entitled to their freedom; but, on the other hand, if the laws of Virginia are to be considered as

⁹ *Hazlerigs vs. Amos*, 1 *Bibb's Reports*, 426.

furnishing the proper rules of decision, it is equally clear that the appellees must be deemed slaves.

In the tribunals of those states, during the existence of the dispute, we would naturally expect to find the rights of the inhabitants decided upon according to the laws of that state, to which the tribunal might belong, without regard to those of the state of which the inhabitants might respectively claim to be citizens. But what would have been the rule of decision in a question where the *lex loci* ought to govern, if such a question had been made with respect to the rights of an inhabitant of the disputed territory before a court of another state, it is not so easy to determine. It seems most agreeable to the dictates of natural justice, as well as of sound policy, that the conduct of the inhabitants during the existence of the dispute should have been regulated, and of course ought always to be decided according to the laws of the state of which they were respectively citizens; that is to say, the conduct of those claiming to be citizens of Pennsylvania according to the laws of Pennsylvania, and the conduct of those claiming to be citizens of Virginia according to the laws of Virginia.

A private citizen must be supposed to be incompetent to decide which of the two states had the right of empire. He was bound to render obedience to the laws of the government whose citizen he was, and it is consonant to every principle of justice and policy, that he should have the benefit of the protection of those laws which he was bound to obey. The appellant, in the present case, was a citizen of Virginia, on his way from one undisputed part to another undisputed part of the territory of that state; for the safety of his family from the savage enemy, he took up a temporary residence in the country claimed both by Virginia and Pennsylvania, from whence he removed prior to the final settlement of the boundary line, and while its adjustment was *in fieri* between the two states. Under these circumstances, we can have but little hesitation in declaring that he was bound to obey the laws of Virginia, and in his turn, was entitled to the benefit of their protection.

Take also his statement of the rule, at that time still uncrystallized, as to questioning the character of the plaintiff in an action of slander:¹⁰

The general character of the plaintiff cannot be questioned by plea; it ought therefore to be questioned by proof in mitigation of damages. The general character of the plaintiff must be considered as coming in, at least collaterally, upon the issue. It is laid in the declaration as the inducement, and the injury to it is the gist of the action.

In the estimation of damages, the jury must take into consideration the general character of the plaintiff and his standing in society. In this case the defendant's counsel was permitted by the court to inquire into the plaintiff's general character in relation to the facts put in issue; but we are of an opinion he ought to have been permitted to inquire into his general moral character, without relation to any particular species of immorality; for a man who is habitually addicted to every vice, except the one with which he is charged, is not entitled to as heavy damages as one possessing a fair moral character. The jury, who possess a large and almost unbounded discretion upon subjects of this kind, could have but very inadequate data for the quantum of damages, if they are permitted only to know the plaintiff's general character in relation to the facts put in issue. This appears to us to be the only correct and rational rule upon the subject; for while it affords the jury a fair opportunity of weighing the injury, it cannot take the plaintiff by surprise, as every man is presumed prepared to show his general character.

In the statement of the technical rules of the law or the more abstruse doctrines of equity he wrote with a clearness which could come from nothing but clear vision. Though the sentences are sometimes

¹⁰ Eastland vs. Caldwell, 2 Bibb's Reports, 24.

long and the construction apparently involved, they nevertheless flow calmly and easily to their destination. Take his statement of the old rule as to defenses cognizable both at law and equity:¹¹

Where matter of defense is purely legal, and the party neglects to avail himself of it at law, it would be contrary to the soundest maxims of policy to permit him afterward to take advantage of it in equity. But if the defense be of such a nature that the party may avail himself of it either at law or in chancery, though he should fail to make it at law, he might, nevertheless, resort to a Court of Equity, with the same propriety as a plaintiff, seeking a remedy for an injury of which a Court of Law and a Court of Equity have concurrent jurisdiction, may elect to which tribunal he will resort for relief. But, as in the latter case, when the election is once made, and a trial had in either of those Courts, the party will be precluded forever from resorting to the other; so, by a parity of reason, in the former, the matter of defense being once decided upon in the one court, can never be retried in the other.

Take his statement of the law as to mutual independent covenants:¹²

There can be no doubt that the judgment of the Court below is correct. The payment of the price was not by the terms of the contract made to depend upon the conveyance of the lot as a previous condition, and the covenant to pay the price and that to convey the lot being contained in different instruments, cannot be construed to be dependent covenants. The failure to convey, therefore, most indisputably could not, upon principles of the common law, be pleaded in bar of an action brought upon the contract to pay the price: nor can this be done under the statute authorizing a defendant in an action upon a specialty to go into or impeach the consideration; for where there are mutual inde-

¹¹ *Morrison vs. Hart*, 2 Bibb's Reports, 5.

¹² *Saunders vs. Beal*, 4 Bibb's Reports, 342.

pendent covenants, it is not the performance of the thing covenanted to be done on the one side, but the covenant itself, which is the consideration of the covenant on the other side; and therefore the failure to perform the one covenant is no failure of the consideration of the other. Judgment affirmed with damages and costs.

These illustrations have been taken almost at random from his earliest opinions as Judge.

In our dual system of government, it is inevitable that there shall be, if not conflict, disagreement at least, between the state and the federal judiciary. Such disagreement occurred several times during Boyle's term, and he met the difficulty with admirable discretion. Upon the federal question of the constitutionality of the law creating the banks of the United States, he yielded his own adverse opinion, and joined his colleagues in following the unanimous opinion of the Supreme Court as being conclusive on all state courts.¹³

But upon matters of judicial procedure or of the legislative policy of the state, he upheld the right of the state to maintain its own system, though the federal courts might adopt a different rule. Thus, notwithstanding the Supreme Court's decision to the contrary, and though his only colleague yielded to that authority, Boyle adhered to the Kentucky rule and held that actual seizin or personal entry was necessary to the maintenance of a writ of right, and that seizin in law was insufficient.¹⁴ And he con-

¹³ *Bank of the United States vs. Norton*, 3 Marshall's Reports, 422.

¹⁴ *Speed vs. Buford*, 3 Bibb's Reports, 57.

curred in holding that the occupying claimant law, for securing to bona fide occupants before eviction a prescribed compensation for improvements, was not in conflict with the compact with Virginia, though three of the seven judges of the Supreme Court had held otherwise.¹⁵

Boyle had been for some thirteen years in a place made for him—a place which he fitted. In ordinary times and under ordinary conditions he would have been a great Judge. That was conceded to him by his contemporaries long before the day of his trial, when through much tribulation, he came to a haven of peace.

The crowning achievement of his life was his triumphant self-vindication at the conclusion of the Old and the New Court controversy. The bitterness of this historic struggle between the contending parties was probably unsurpassed in Kentucky, even by that engendered by the Civil War, until the close of the century. For its proper understanding it is essential to review briefly the financial and political situation in the state when that controversy arose.

The Napoleonic Wars, with the enormous expenses attendant, resulted in an excessively inflated paper currency, in the terms of which prices were enormously enhanced. The precious metals were hoarded and did not circulate as money. The return of peace was followed by a more or less violent return

¹⁵ Bodley vs. Gaither, 3 Monroe's Reports, 57.

to specie payments, and the contraction of the circulating medium necessarily resulted in a tremendous fall in prices. The situation in Kentucky was aggravated by the fact that at the legislative session of 1817-18 there were chartered forty independent banks with an aggregate capital of about ten million dollars which were authorized to redeem their notes either in specie or in the notes of the Bank of Kentucky, which had then resumed specie payment. As the paper of these banks went into circulation, the markets rose and a wave of speculation swept over the state. The ventures were generally disastrous and speedily so, and the markets fell, but the debts remained the same. The pressure of debt became such that at the legislative session of 1819-20, the time for which judgments might be replevied was extended from three months to twelve. During 1820 the distress of the debtor class became terrible. Adair was elected governor in that year, and at the ensuing session the bank of the Commonwealth was chartered and was not required to redeem its notes in specie. By an act passed at that session, the judgment creditor was subjected to a stay of two years, on the debtor's giving bond with security, unless the creditor should endorse on his execution a willingness to accept notes on the Bank of Kentucky or the Bank of the Commonwealth, and the act was made to apply to debts incurred before its passage. By the exercise of the legislature's power, under the charter of the Bank of Kentucky, to elect directors

thereof, a directory was elected that was pledged to accept in payment of debts due to that bank the paper of the Bank of the Commonwealth. This, instead of sending up the paper of the latter bank, as was intended, sent down that of the Bank of Kentucky. As the new bank's paper went down to fifty per cent. of its face value, the creditor, it was said, "had his choice of two evils. One was to receive one-half his debt in payment of the whole, and the other was to receive nothing at all for two years, and at the end of that time, to do the best he could—running the risk of new delays at the end of that time, and of the bankruptcy of his securities."

The indignation of the creditors and the distress of the debtors caused the people of Kentucky to forget their former political alliances, throw off their party ties, and divide into the relief and anti-relief parties. These parties were led by such men as George M. Bibb, who had preceded Boyle as chief-justice, John Rowan, who had been a judge of the Court of Appeals, Solomon P. Sharp and William T. Barry on the relief side; and Robert Wickliffe, of Fayette, George Robertson, who followed Boyle as chief-justice, and Chilton Allen, of Clark, on the other. Circuit Judge Clark, of Clark County, promptly decided the stay law unconstitutional and was summoned before a special session of the legislature, where it was proposed to remove him from office by address. The effort failed for want of the two-thirds majority required by the constitution.

His opinion was followed by Circuit Judge Blair, of Fayette, and both parties awaited the decision of the Court of Appeals upon the question.

The court then consisted of three judges. Boyle's colleagues were William Owsley, who was appointed April, 1812, and Benjamin Mills, who was appointed in February, 1820. Owsley as a young man had been assisted by Boyle in his legal education and was his close friend. All three were men of great firmness and courage—qualities which were soon to be needed. Their decision was not awaited in silence. A great popular majority was in favor of the so called relief laws, and firmly believed in both the power and the right of the legislature to adopt them. They had been so accustomed to talking and hearing talk of a Republican form of government and of bowing to the will of the majority, that it was with something of a shock they learned that they must wait until three unassuming gentlemen on the bench determined whether the will of the majority could constitutionally prevail. There were mutterings which grew to open threats of what would happen if the decision should be adverse to the popular will. No intimation came from the court, however, until October 8th, 1823, when Chief-Justice Boyle delivered the opinion in Blair vs. Williams, followed on October 11th, by the opinions of Judge Owsley, in Lapsley vs. Brashears, and of Judge Mills in both cases.¹⁶ The court held that in the clause of the

¹⁶ 4 Littell's Reports, 34, 46, 65.

Federal Constitution which forbids a state to pass any law impairing any obligation of contracts, the obligation referred to is not one arising from or dependent on conscience, "for the obligation dependent upon conscience alone is obviously beyond the reach of human legislation," but is the legal obligation or remedy whereby the performance of the contract may be enforced, because legislation cannot impair the legal obligation of contracts otherwise than by operating on legal remedies for their enforcement.

In conclusion, the court said, in the opinion of Chief-Justice Boyle:

It is, then, the remedy allowed by law in force at the date of the contract, being that on the faith of which the contract was made which constitutes its obligation; and it consequently results, that the remedy which was allowed by law upon the contract between the parties in this case, on the 19th of November, 1819, the date of the contract, is its obligation.

Does, then, the act of assembly in question, impair that obligation? By the law as it stood at the date of the contract, the defendants were allowed to replevy the debt but for three months only, and the money, if not then paid, was required to be made of their estate, without further delay; but by the act in question, they are allowed to replevy the debt for two years, or enter into a recognizance for the payment of the money within that time. And surely it cannot require argument to prove that the latter act impairs the obligation imposed by the former law. Indeed, the avowed object of the act in question was to relieve the debtor from the obligation he was under to pay his debt in the time prescribed by the former law, and give him farther time of payment; and according to any sense of the word, the act in question must

impair the obligation imposed by the former law, and is, therefore, unconstitutional and void, as it relates to the contract between the parties in this case, as well as to all contracts made previous to the passage of the act.

Then the storm broke. The decision produced the greatest exasperation in the relief party. The judges were denounced as usurpers—tyrants—self-made kings—and charged with arrogating to themselves supreme power. Their authority to declare a legislative act unconstitutional and to disregard it on that ground was bitterly and violently denied. While the judges were publicly denounced for their decision on the stump and in the press, Judge Bibb, who appeared on the relief side in *Blair vs. Williams* against *Wickliffe* on the other, filed a petition for rehearing in both cases. Haggin, Barry and Rowan were his colleagues in *Lapsley vs. Brashears* and *Harrison and Breckinridge* appeared with *Wickliffe*.

At this day the question seems easy enough of solution. Since the victory was won, popular thought, as well as legal, has crystallized in the form then determined. But to form a really just judgment of the question as it then appeared, it would be necessary to go back and consider the forgotten arguments of the defeated side. The lost cause has few apologists, and the reasons which seemed weighty enough to bring the scales to a balance are dropped and discarded when the issue is once decided. The court itself was not unanimous at the

outset. There are few things connected with the controversy more striking than the manful statement of Judge Mills at the conclusion of his opinion, when in defiance of public clamor, he abandoned the side of the majority.

Such is the conclusion to which my mind has come on this litigated question, after the most mature deliberation and research, and I am bound by my oath and official duty to express it. I am free to confess that it is different from the opinion, which when yielding without investigation to the practice of the day, I once entertained. To adhere to an error when convinced, is odious; to retract it is praiseworthy and magnanimous, and I hesitate not to choose the latter course.

A skeleton of the arguments which seemed plausible, if not convincing, to those who owed debts and were unable to pay, may be found in Judge Bibb's petition for rehearing. Those arguments were amplified, elaborated and reiterated in the speeches and manifestos of the time. It is, of course, impossible to give them here. It is enough to say that the relief party represented that under the court's ruling a law giving a more speedy and efficacious remedy to the creditor was not prohibited, but was void if the remedy were more favorable to the debtor. They claimed that the remedy was no part of the obligation, but the effect and consequence of it—something which flowed out of it; that it had been frequently held that the statute of limitations operated only upon the remedy and not upon the right, and that it did not destroy the right but merely withheld

the remedy; that consequently the redress must be sought within the time fixed by the *lex fori* and not within that fixed by the *lex loci contractus*, and that the limitation period might be altered by the legislature; that the mode of redress was governed by the law of the place where redress was sought, even if such law permitted the arrest of the debtor's body, which was not allowed by the law of the place where the obligation was created; that the remedy must be according to the law of the forum to which application was made and in conformity to the rules there prescribed; that remedy was a subject of legislative discretion; that a summary and more expeditious remedy might be given by statute upon obligations theretofore created, as had been held by the Court of Appeals, with Judge Boyle upon the bench, which court had also held that a statute might constitutionally subject lands to execution for debts before contracted; that the force which, in a state of nature, a party might use to exact performance of an obligation, had been surrendered to society, whose aggregate force was substituted therefor, and that the individual had no right to deny to society the right to modify the mode of exercising its aggregate force; and that, as had been held by the Supreme Court in an opinion of Chief-Justice Marshall, the distinction between the obligation of a contract and the remedy given by the legislature to enforce that obligation existed in the nature of things, and, without impairing the obligation of the contract, the remedy

might certainly be modified as the wisdom of the nation should direct. These were some of the arguments advanced in support of the proposition that alterations in execution laws, process, and courts do not impair the obligation of contracts as prohibited by the Federal Constitution.

At the legislative session in the Fall of 1823, pending the petition for rehearing, the question was taken up. Resolutions were introduced in the legislature and printed, in which after twenty-six pages of most inflammatory preamble, the legislature most solemnly protested against the doctrines promulgated in the decision "as ruinous in their practical effects to the good people of this Commonwealth and subversive of their dearest and most invaluable political rights;" and resolved "that if the decision should not by the court be reviewed or reversed, but should be attempted to be enforced upon the good people of this Commonwealth, the legislature cannot, ought not, and will not furnish any facilities for its enforcement" . . . and further, "that any effort which the legislature may feel it a duty to make for the contravention of the erroneous doctrine of that decision, ought not to interfere with, or obstruct the administration of justice according to the existing laws which, whether they were or were not expedient, are believed to be constitutional and valid; and which should, when it shall be thought expedient to do so, be repealed by the legislature, and not by the Appellate Court." "But," adds the court re-

porter, "on the 4th of December, 1823, the petition for rehearing was overruled."

On that same day, George Robertson, then speaker, arose in the legislature to attack the resolutions in an address which covered some twenty-four closely printed pages of flawless logic, superb and stately rhetoric, and biting allusions.

But on the 10th of December, the House of Representatives adopted the resolutions.

By the constitution of 1799, it was provided that the judicial power of the Commonwealth should be vested in one supreme court, which should be styled the Court of Appeals, and in such inferior courts as the General Assembly might from time to time erect and establish. It was also provided that the judges both of the supreme and inferior courts should hold their office during good behavior; but for any reasonable cause, which should not be sufficient ground of impeachment, the Governor should remove any of them on the address of two-thirds of each House of the General Assembly; with a proviso that the cause or causes for which such a removal might be required should be stated at length in such address and on the Journal of each House. There was no provision, as there had been in the first constitution, prohibiting the legislature from reducing a judge's salary during his continuance in office. The Court of Appeals, therefore, was a constitutional court, while the other tribunals were of legislative creation. The Court of Appeals could not be constitutionally abolished, nor

could its judges be removed from office except as the result of an impeachment trial or by address. Nor was it possible, without violating the spirit of the constitution, to starve them out of office, for the constitution provided that they should at stated times receive for their services an adequate compensation to be fixed by law.

There was no ground for impeachment. The campaign of 1824 for the governorship and the control of the legislature was one for the removal of the judges by address. General Joseph Desha was the candidate of the relief party for the office of governor—a man of great energy and intense partisanship—and was elected by a very large majority. The relief party had a great majority in both Houses of the General Assembly. The judges were summoned before the bar of the legislature to show cause against their removal, and stated at length the grounds of their decisions. Barry, Bibb and Rowan replied to the response of the judges. The resolutions for the removal of the judges by address passed the House by a vote of sixty-one to thirty-nine, every member voting. The majority, though large, was not the two-thirds required by the Constitution. The failure to obtain the necessary two-thirds vote had been foreseen, and the Senate had already passed an act to repeal the law organizing the Court of Appeals and to reorganize a Court of Appeals, by which the two acts establishing the Court of Appeals and all amendments thereto and “every act or part

of any act or acts . . . concerning the Court of Appeals, or for giving or allowing any salary or compensation to the Chief-Justice of Kentucky or any judge or justice of the Court of Appeals . . . " were specifically repealed, and another Court of Appeals was attempted to be established and the Governor authorized to appoint four judges thereof. The debate in the House extended over three days and nights. The excitement was intense. The speech of Mr. Wickliffe was a marvel of withering invective. Robertson delivered an elaborate address. The Governor and Lieutenant-Governor were present on the floor of the House urging the passage of the bill. The argument against the bill was, of course, its unconstitutionality, as an attempt, under the guise of reorganization, to abolish a constitutional court, and by indirection to accomplish by a bare majority what the constitution required should be done by a two-thirds vote on impeachment or address. One of the principal arguments in favor of the bill was made by confusing the proposed action with that taken by Congress in the adoption in 1823 of the judiciary act, by which the circuit courts established at the close of Mr. Adams' administration were repealed at the beginning of Mr. Jefferson's. This argument was fallacious because in the debate upon that bill it was conceded by both sides that the Supreme Court created by the Constitution could not be abolished by Congress. The discussion as it proceeded grew exceedingly fierce and

the ordinary courtesies of parliamentary debate were disregarded. Shylocks and Silver heels on one side, and Judge-breakers on the other were among the milder forms of epithet used. Indeed the Governor and his party seem to have adopted as a slogan the title of Judge-breaker, which had been first used as a term of reproach. At midnight on December 23d, 1824, in great tumult, the House concurred in the bill.

Nothing remained to the old court party except an appeal to the people. A brief but fervid protest was issued by the minority of the General Assembly. The new court was organized with Barry as chief-justice, and Trimble, Haggin, and Davidge as associate-judges. The clerk appointed by the new court secured possession of the records by force, and that court proceeded to decide cases, the first opinion being delivered April 19th, 1825. Boyle and his associates denied the constitutionality of the act creating the new court and continued to hear and decide such cases as were brought before them. The records having been forcibly taken by the clerk of the new court, there seems to have been no decision by the old court at the spring term of 1825, the one opinion appearing under the heading of "Spring Term, 1825" in the third volume of Monroe's Reports, having been delivered on October 15th of the year previous. Curiously enough, Judge Bibb was the counsel who filed a petition for rehearing in the case, which was overruled. The new court having

possession of the records, delivered fifty-two opinions at the spring term. With great unanimity, the bar of Kentucky adhered to the old court, and the great majority of the circuit judges obeyed its mandates. A few of the circuit courts recognized the new court and a few others recognized both tribunals.

Meanwhile, the campaign of 1825 was waged with great activity and unexampled bitterness. The parties had been rechristened, and when not referred to in terms of opprobrium, were now known as the Old and New Court parties. The result was an overwhelming victory for the Old Court party—a result which is a little surprising under the circumstances, with the passions of the people excited as they were, until we consider the great, though quiet influence which must have been exerted by the practical unanimity of the circuit court bench and bar. One contributing factor which cannot be overlooked in reading the popular addresses and writings of the time was the personal character of Boyle and in less degree, because less known, of his associates. As a result of the popular vote, there were but twenty opinions delivered by the New Court at the Fall term.

But while the Old Court had a large majority in the lower House, only one-third of the Senators were elected in that year, and the Senate was equally divided with the casting vote of the Lieutenant-Governor on the side of the New Court. A bill to repeal the reorganizing act which passed the House was re-

jected by the Senate. Various compromises were offered by the New Court party, some of which provided for the continuance of the old judges in office, with Boyle as chief-justice, but as all of them carried by implication a recognition of the constitutionality of the reorganization act, Boyle and his party steadfastly refused them. After the meeting of the legislature, the New Court ceased to do business, but refused to surrender the records, or to permit parties or counsel to have access to them. Their clerk's office was guarded by armed men, and as the House adopted a resolution that it was the duty of the Old Court, through its sergeant-at-arms, to regain possession of its records, it was with some difficulty that a hostile encounter was prevented. The legislature adjourned, and it became necessary to go to the people again. Each party had its newspaper organ, and it is a little amusing at this day to read the open letters then published, which, disclaiming personal disrespect, were exceedingly disrespectful. It is a little startling, too, to read the elaborate arguments as to the extravagance of the New Court party in increasing the aggregate salaries of the judges from forty-five hundred to eight thousand dollars per annum. But the tide of public opinion had turned against the New Court party. At the session of 1826, the Senate, as well as the House, was in favor of the Old Court, and on December 30th, 1826, an act passed both Houses, the Governor's objections notwithstanding, "to remove the unconstitutional ob-

structions which have been thrown in the way of the Court of Appeals." The salaries of the old judges for the time during which they had served without salary were voted to them, and the Old Court proceeded in the discharge of its duties. Since that time, the decisions of the New Court, which are printed in the third volume of Monroe's Reports, have never been recognized as valid and until quite recently have never been cited as authority.

The whole controversy was excessively distasteful to a man of Boyle's quiet tastes and retiring disposition. Nothing but a sense of duty, which in him was religious, induced him to retain his seat upon the bench during that trying period. As Robertson said of him, "He never sought office; he never shrank from duty." It had been for some time his intention to retire as soon as the controversy should be finally settled. It was virtually settled by the election of the Old Court Senate. Anticipating his retirement from the Court of Appeals, President John Quincy Adams on October 20th, 1826, appointed him Judge of the United States District Court for Kentucky, and he took the oath of office on November 8th, 1826, thereby vacating the chief-justiceship. Compared with the laborious duties of the office which he had held for sixteen years, those of his new office were exceedingly light—so light, that he is said to have felt scruples as to accepting the salary of fifteen hundred dollars. That office he retained until his death on January 28th, 1835, devoting his

leisure to the care of his farm—in which he became much interested—to his books, and to the teaching of law. For a year he was sole professor of law in Transylvania University. The annals of his life during the nine years of his service as district judge, are extremely simple. There is nothing but the record of a good and useful life. All his life, though spent in public station, he had shrunk from notoriety. It was the discharge of duties which he regarded as imperative, which brought him prominently before the public eye. In his retirement, in his well-earned repose from labor, in his leisure to follow his simple tastes, to enjoy his simple pleasures, to read the books from which his judicial duties had debarred him, he was very happy. From being somewhat skeptical in his youth, he became deeply religious. During the cholera epidemic of 1823 his wife died. She had been in rather feeble health for some time previous. Their married life had been particularly happy. He never recovered his former spirits, but spoke hopefully of his own approaching death. He died surrounded by his children and friends. As the end approached, he said to his physician, "Doctor, I am dying"; and then, as if he had looked backward over the record of his life of labor and usefulness, he added, "I have lived for my country."

WILLIAM WIRT.

WILLIAM WIRT.

From a painting of C. B. King, in the Attorney-General's Office
at Washington.



WILLIAM WIRT.

1772-1834.

BY

JOHN HANDY HALL,

of the Virginia and Pennsylvania Bars.

THE office of Attorney-General of the United States has been filled by many eminent lawyers and judges, whose fame has survived to the present day. But no incumbent of that office so raised its reputation by identifying it with his own as did William Wirt. Conversely, the memory of other attorneys-general is based upon previous or subsequent achievements on the bench or at the bar. But while Wirt's high character and legal attainments made his appointment one of the worthiest, his legal fame must rest primarily upon his conduct as chief counsel for the United States during the formative and crucial period of the country's history.

William Wirt was born on November 8th, 1772, near the then unbuilt city of Washington, at Bladensburg, a town which was to attain an unenviable notoriety as the dark and bloody ground of the American duellist and as the scene of the most disgraceful defeat ever sustained by the national arms. Jacob Wirt, a native of Switzerland, with his Ger-

man wife, settled in the Maryland village shortly before the outbreak of the Revolution, and supported his constantly increasing family by keeping the village tavern. At his death, within two years after the birth of his youngest son, William, he left a property of less than four thousand dollars, to be divided between his wife and his six children. The future attorney-general started upon his career from a humble origin, and in dire danger of actual want.

At a time when most of the livers on the land supported themselves from the soil, and when the needs of life were less complex, the straitened circumstances of the Wirts were not so obtrusive as might be expected to-day. The family, living as a unit, eked out their slender means with true German thrift. Some recollections of these early days, afterward written down by Wirt, show that they were uneventful except when rumors of the great events then occurring penetrated even to sleepy Bladensburg. At one time a body of Continental regulars with the cavalry of Lee's legion filled the tavern with their blue coats and buff and scarlet facings, and Wirt narrates that he performed on their drum to their great satisfaction. At other times, provincial magnates, returning to their homes from the sessions of the new government, stopped over night to reason deep as to the prospects of the new experiment.

At eight years, Wirt's home life ended, and he began a series of wanderings among various boarding

schools and private tutors. The boy was undersized, delicate and physically timid. The germ of his future character was already apparent in a nervous and over-developed imagination, an exaggerated and very German sensibility, and an occasional spark of elvish humor. But these were poor qualities to protect a lonely lad cast on the untender mercies of his kind, and he seems to have been bullied. Perhaps this was not the worst luck that could have befallen him, for he was cast in consequence largely upon the worthy collections of books which filled the shelves of the country families with whom he was placed. The lively nature of his talents was shortly and variously displayed along the lines of his success in after life, for he has left it of record that he had prepared his first legal paper (the constitution of a moot court organized by himself), written his first essay in polite letters (a roguish quip aimed at a tyrannical usher), and wooed and fairly won his first love (they were to have been married in the early Fall), before he had attained the age of eleven years!

In organizing his moot court, Wirt had insensibly laid the foundation of his fortunes. The draft of its constitution was shown by a school-fellow to his father, and, as a result, Wirt was invited at the age fifteen, to become the tutor of this school-fellow (who afterwards became Governor and Senator of Illinois), and of two cousins, who were preparing for college. Mr. Benjamin Edwards of Montgomery County, Maryland, in whose family Wirt was thus

thrown, was a gentleman of the best colonial type, honorable, well-to-do, highly educated and a man of importance in his neighborhood and state. To his aid and friendship Wirt never failed to ascribe his after success in life, and the relation between them was always as affectionate and confidential as between father and son.

After leaving the home of Mr. Edwards, and probably with some assistance from that friend and others, for his slender patrimony was fairly exhausted, Wirt began the study of law in the office of an attorney at Montgomery Court House, Maryland. His legal studies could not have been of an exhaustive character, for he removed to Virginia within a year; evaded the legal requirements of a twelve years' residence by what he calls a "manœuvre," but does not more particularly specify; stood the easy-going examination of that period before three judges of the Supreme Court; and within sixteen months from his first incursion into Blackstone, was more or less comfortably settled at Culpeper Court House, a full-fledged attorney, with a limited knowledge of the law, no particular resources, and a small but characteristic library consisting of a set of Blackstone, two volumes of Don Quixote and a copy of Tristram Shandy.

There was nothing in the young barrister at this time from which a great career at the bar could have been reasonably prophesied. On the contrary he suffered under grave disadvantages by reason of an

excessive natural timidity and an indistinctness of enunciation almost amounting to a stammer. This last drawback was gradually eliminated by strenuous and persevering effort and practice. It is probable that his early trouble in this respect, which occasionally suggested itself even in later years in a too hurried utterance in moments of difficulty or high excitement, was due largely to his other early fault of shyness. This, in turn, had its origin in an exaggerated self-consciousness, and was gradually dissipated by the growth of self-confidence, its place being taken by a sense of the dramatic in speaking which was a chief asset in Wirt's equipment as an orator. Traces of his early timidity remained, however, and made him through life morbidly introspective and hypercritical as to his own efforts in every field of endeavor.

Some record remains of Wirt's first appearance at the bar. It was in the first and only case of another beginner, who took Wirt with him, probably for the encouragement of added numbers. The case was an assault and battery with joint judgment against three; of whom two had been released after judgment, and the third, who had been taken in execution and imprisoned, claimed the benefit of the release as inuring to himself. Instead of pursuing the usual remedy by the writ of *audita querela*, the young lawyers presented their case in the form of a motion. This called forth the disapproval of several of the older members of the bar, who interposed as *amici curiæ*, after a free and easy fashion

then in vogue in the County Courts, where the bench was occupied by ordinary justices of the peace. These criticisms so aroused Wirt that he forgot himself, and, to his own surprise, delivered a very clear and cogent argument in defense of his advanced position. Whether his reasons would have prevailed alone is doubtful, but his spirit and bearing struck the fancy of one of the leaders of the local bar, who good humoredly interposed as an additional *amicus curiæ*, sided with the petitioners, and succeeded in carrying their point for them.

There is little record of Wirt's career at the bars of Culpeper, Albemarle and Fluvanna counties, where his early practice lay. It is doubtful if his legal knowledge was of a higher order than that of the other youngsters who rode the circuit in his company. In fact nothing can be clearer through Wirt's whole career than that his success as a lawyer was due primarily not to his legal erudition, but to the superior judgment, taste and culture, which he was able to bring to bear upon the subject in hand. It was needful to success that he should have confidence in his own powers, and ease in speaking, and these he was insensibly acquiring in the smaller practice of the Virginia bar. Wirt himself looked back upon this period of his life with candid amusement: "Could I have supposed," he wrote at a later day to a friend, "when you and I were threading the hog-paths through the wilds of Fluvanna, and trying to make our way at the bar of that miserable court,

that a day would come when I could dare to hold up my head in the Supreme Court of the United States, and take by the beard the first champions of the nation?"

While mastering the details of minor practice, Wirt was developing traits and habits which to some extent clung to him through life, and clouded his memory after death. The Virginia circuit riders were a rollicking, hard-drinking lot, at a time when three-bottle men were the rule and not the exception, and when to be "drunk like a gentleman" attracted only the comment of the "unco guid." The wit and high spirits which made the mature Wirt the life of every convivial and social gathering, became apparent in the young lawyer, and made him the leader in all the escapades and high-jinks with which youth sought to temper the grave proceedings of the law. His social qualities rapidly expanded under the beams of popularity, and he became a sort of Sheridan among the gayer spirits of the northern counties. His sayings and pranks were bandied about in the court-rooms and taverns, and his indiscretions and excesses were subjected to the usual exaggerations of popular report. In the necessary reaction which came with Wesley and Whitfield, these anecdotes, many of them in all probability handed down from the frolics of Alcibiades or Antony, came pat to the mouths of the popular preachers; and Wirt was held up as a horrible example from one end of the country to the other.

Wirt's practice at this time drew him frequently into the rich neighboring county of Albemarle and he here made acquaintances who determined the future history of his life. A rich Scotch physician named Gilmer kept open house at his estate of Penn Park. His library was one of the largest and best in Virginia, his hospitality was as extensive as his very ample means, and he was blessed with several handsome daughters. Wirt was soon a familiar inmate, finding in the Doctor a congenial spirit, and in his library and family a constant source of pleasure. The young lawyer was now in his twenty-fifth year. It was said of him in later years by one who knew him at this time: "His figure was strikingly elegant and commanding, with a face of the first order of masculine beauty, animated and expressing high intellect. His manners took the tone of his heart, they were frank, open and cordial, and his conversation, to which his reading and early pursuits have given a classical tinge, was very polished, gay and witty. Altogether he was a most fascinating companion, and to those of his own age, irresistibly and universally winning."

These attractions were successful in obtaining the affections of Mildred, the eldest daughter of Doctor Gilmer; and his marriage to her in 1795 securely established Wirt's fortunes. Her father dying not long after, Wirt became the proprietor of a comfortable estate in Albemarle called Rose Hill, which fell to his wife from her father's property. There

is little record of Wirt's first love. She died five years after their marriage, and was buried under her roses at Rose Hill. The stone which was raised above her bears some verses whose unusual simplicity and evident sincerity would seem to confirm the tradition that they were written by her husband.

It was at the house of Doctor Gilmer that Wirt first met and was familiarly associated with those great leaders of the Democratic party to whom he owed in large measure his after advancement. Penn Park was situated only a few miles from the homes of Thomas Jefferson and his two leading disciples, James Madison and James Monroe, and it may be said that the true seat of government was located at that time in the neighborhood where this band of country gentlemen met around one another's tables to reason high and deep, and settle the foundations of those democratic principles which they were championing, oddly enough, against the handicraftsmen of New England and the merchants of New York. Wirt's social qualities and his evident natural ability soon attracted the attention of Jefferson, who was not unsusceptible to the subtle flattery of youthful adoration. It was to this that Wirt undoubtedly owed his subsequent political fortunes and his first great opportunity in the legal field.

The death of his wife drove Wirt from his retreat in Albemarle. He sought distraction in the society of Richmond, at that time one of the first cities in the United States. His friends had secured for him

the position of Clerk of the House of Delegates, which rendered him independent of his country farm, and enabled him to renew his acquaintance with all Virginians of political prominence. This post he held for three years, during which he fell into associations whose unfortunate influence he realized and of which he afterwards said: "I dropped into a circle dear to me for the amiable and brilliant traits which belonged to it, but in which I found that during several months, I was dissipating my health, my time, my money and my reputation. This conviction dwelt so strongly, so incessantly on my mind that all my cheerfulness forsook me, and I awoke many a morning with the feelings of a madman."

Wirt's practice at this time was apparently almost abandoned. He came once, however, before the public eye, as one of the counsel for Callendar. This notorious person was one of the most indefatigable and daring of the swarm of pamphleteers who were the advance agents of the sensational press of the present day. He had at one time or another attacked every person of prominence in the land, and was finally indicted under the newly passed sedition law at the instance of Judge Chase, a somewhat dogmatic and overbearing jurist, who was intensely hated by the Democrats. For this reason partly, and partly as a test case of the unpopular law, a political turn was given to the whole cause, which became, in effect, the first stage in the after impeachment of

Judge Chase. Wirt was employed as junior counsel, probably at the suggestion of Jefferson. His career in the case was not notable. The counsel for the defense were far more anxious to attack the Judge than to defend their client; and they seized the first opportunity to take exception to the attitude and conduct of the court and parade solemnly from the court room, abandoning the cause, on the assumption that no fair trial could be had. The suit, and its rather theatrical termination, attracted the attention of the nation at the time, and the conduct of Judge Chase during the proceedings was among the charges brought against him in the subsequent warmly pressed but unsuccessful proceedings for his impeachment.

From his political office and its dangerous associations Wirt was relieved by the division of the Chancery jurisdiction in Virginia into three districts. This necessitated the appointment of two new chancellors, and Wirt's popularity among the legislators stood him in good stead. He was unanimously elected to fill one of the vacancies. In his own words: "It descended upon me, unsolicited, unthought of, with the benevolent grace of a guardian angel." For he had fully realized the futility of his previous course of life, and he took up his new duties with a host of good resolutions.

It is probable that these evidences of a change of heart were not wholly induced from within. Wirt had formed the acquaintance of the family of Colonel

Robert Gamble, a wealthy merchant of Richmond. Elizabeth, the second daughter of this gentleman, was the object of Wirt's second attachment. She was, fortunately for his future career, an ideal wife for a man of Wirt's constitution, firm, practical, an admirable manager, with little ambition to shine outside the limits of her home circle, but fully capable of controlling and inspiring the warm-hearted but easily-led man whom she married. Wirt's natural charm might obtain him an easy conquest of the daughter. But he seems to have been less welcome to her family. It is told that her father, a grave and dignified old gentleman, called at Wirt's office to reply in person to Wirt's application for his daughter's hand. The call was made at an early hour. The unsuspecting Wirt had been making a night of it with his choicest cronies, and Colonel Gamble opened the door to find his prospective son-in-law classically armed and accoutred, with a tin basin for a helmet, a sheet-iron blower for a shield, and a poker for a sword, declaiming lustily Falstaff's narrative of the celebrated encounter with the men in buckram. The old gentleman unsmilingly bowed and withdrew.

Despite these and possibly other untoward circumstances, Wirt was married in Richmond in December, 1802. The date is notable, for it is to his life what the Hegira was to Mohammed. Before it all was doubt and promise, after it all was steady achievement. The solid and resolute qualities, the severe

practical and homely virtues, which he inherited from his Swiss and German forbears, began from this time to assert themselves, and to supersede a wildness and recklessness which were the outcome of youth, unconscious histrionism, and a desire for applause. From a dreadful example, he became a steady and reliable husband, father and citizen; from a careless deist, he became a careful and devout Christian; from a happy-go-lucky epicurean he was transformed into an anxious and prudent man of business. Sentimental in unessentials he always remained; and to the end of his life he carried the spirit and humor that had earned him the sobriquet of "*Φωφ* Loving Wirt." But from the date of his marriage he seldom allowed sentiment or wit to blind him to the main-chance, and all his movements became measurably ordered to the check-reins of prudence and respectability.

This new state of affairs was strongly indicated by his first act after marriage. It was to resign the chancellorship and return to the practice of his profession. From his office he had derived considerable prestige, but he (or his wife) was wise enough to see that he could hope for little more of any real value. At this time he strongly meditated removal to the new and flourishing state of Kentucky. But once more the spirit of adventure was curbed by his newly acquired prudence, and he decided upon Norfolk, Virginia, instead. While fees were high in Kentucky, he had heard "that there was no cash in

that state; that fees were paid in horses, cows and sheep, and that the eminence of their lawyers was estimated by the size of their drove, on their return from their circuits." On the other hand, as he comfortably reflected, Norfolk possessed one of the most flourishing banks in the United States.

Nothing could be more consistent than the rise and progress of Wirt from this time in the ranks of his profession. He declared to his friends: "I am thirty years of age, fifteen years more will make me forty-five. In my opinion a man at forty-five ought to be able to work or play as he pleases." And he set steadily to work, with the utmost industry, to achieve a competence within the acquired time. He was not a beggar; neither of his marriages, humanly considered, could have been called a losing speculation. But his letters from this time on never cease to harp upon the necessity of a suitable provision for his family, actual and prospective. It is strongly probable that the profession of that day was indebted to Wirt for a substantial improvement in the status of that very important legal adjunct, the lawyer's fee, for he expresses discontent at this, the outset of his legal career, that Edmund Randolph, at that time the leader of the Virginia bar, scarcely made both ends meet; whereas, this state of affairs had been comfortably improved when Wirt in turn took his place as head of the bars of Virginia and Maryland.

It was at this time that Wirt first gave evidence of the secret ambition of his life. This ambition

was neither legal nor political, but literary. It is undeniable that he was never a "black letter" lawyer. He himself frequently and bitterly complained that he could never descend into the depths plumbed by others. His legal ambitions were of two kinds; that which arose *extra* from the incentive of the necessary support of his family, and more potently, that which arose from his inner spirit of emulation. Into each of his great cases Wirt entered like a champion into the lists, eager to measure steel with an opponent. Before every case in which he was to meet a new and dangerous rival he was in a twitter of high and unconcealed excitement and expectation, as to what showing he would make against his antagonist, and what would be the feeling and verdict of the public as to the contest. It was this splendid spur that pricked him on. For the law, *per se*, he had no especial enthusiasm. He grew up with it, and it was only his comfortable, and sometimes pleasant means of livelihood. But he exulted in the glorious dust of the arena, and arose like Antæus from every grapple doubly strong for its successor.

As to political ambition, properly so called, Wirt also had little or none. He had the quality which Mirabeau contemptuously attributed to Lafayette, "a taste for small distinctions," and valued each office for what of glory it entailed. But while he was never known to refuse, he never solicited such advancement, and to the end of his days he could never be brought to labor, in any way, actively for political

preferment, the entire business of practical politics being to him strange and distasteful.

One ambition, however, Wirt cherished, which was to shine as a man of letters. It seemed to him the one avenue to any certain and durable fame. Through life he returned to it, and it was at this period that he made his first essay. "The Letters of a British Spy" were published at Richmond in 1803. They purported to be letters containing observations on life and society in Virginia, written by an English traveler, and were so artfully framed that many persons long persisted in the belief that they were *bona fide*, some even going so far as to identify the English author. The papers attained a wide popularity, were published in book form, and went through several editions. It did not detract from their general popularity that they contained scarcely veiled personal allusions, and gave deadly offense to some of the more pompous of Wirt's contemporaries. The secret of their authorship was poorly kept. Suspected by many from the first, and faintly denied by Wirt, it was so well established in later years that he was called the "author of the British Spy" by Webster in the preface of the later "Life of Henry." The "Letters of the British Spy" were followed by some scattered essays collected under the title of "The Rainbow," one of which is notable as setting forth Wirt's advanced views as to the education of women. In 1811 "The Old Bachelor," a series of papers by Wirt and others, in very palpable imita-

tion of the "Spectator," was published, and attained a reputation even greater than the letters of the Spy. In these essays the point of view of the Spy was reversed. They dealt, indeed, with Virginia life and manners, but from the view-point of one "to the manor born;" and while more carefully considered and written, they thus lack something of the piquancy of their predecessors. One of this series, the "Blind Preacher," achieved high fame at that time, and was extensively quoted, and translated into several languages. Other notable numbers repeated and expanded his plea for female education, and exploited his views on oratory and its attainment, which was in his opinion to be secured by the resolute practice of elocution and by a severe adherence to classic models and disregard for mere useless ornament. This last number is the more valuable as being in some measure a record of the author's personal experience; since his own delivery, by earnest practice and effort, had changed from something very like a stutter, through the nervous and too hurried delivery of his early Richmond days, to a vocalization singularly sweet and well modulated, with an address which was considered one of his first claims to distinction at the bar.

The flattering reception of his early efforts caused Wirt to dream great things. He projected a series of lives of American Worthies, and chose Patrick Henry as the theme of his first essay. But here he first came into contact with the real labor and drudg-

ery of letters, and learned by bitter experience that no man could serve two masters. The task seemed easy, at first view, as Henry had been living a few years before. But when he began to collect material, Wirt found that he was not now indulging in casual dissertations or discussing occasional hobbies, but that he was face to face with work, as real and exacting as that of the law.

The Life dragged painfully and the author was wearied and disgusted with it long before it saw the press. It was published in 1818, and received lavish encomiums from the Southern and Democratic Reviews; but the North American Review and the Boston Review fell foul of it, which was, indeed, to have been expected. Its reception was on the whole favorable, and rather surprised its discontented author. At the present day the Life of Henry constitutes Wirt's chief claim to literary fame, but even this is little read. The author's style, while severe enough for the purposes of the rostrum, is too fanciful and florid for the stricter paths of prose letters. This was noticed and gently rebuked by Jefferson, to whom Wirt submitted the manuscript, and was to some extent realized by Wirt himself. In an inimitable letter to a friend he discussed this very difficulty in his own true style,—a style, he never so far forgot his pose as to put into print, but which would make his private letters, if collected and published, by far the first of his literary productions.

This same business of stating facts with rigid precision not one jot more or less than the truth,— what the deuce has a lawyer to do with the truth? To tell you one truth, however, I find that it is entirely a new business to me, and I am proportionately awkward at it; for after I have gotten the facts accurately they are then to be narrated happily; and the style of narrative, fettered by a scrupulous regard to real facts, is to me the most difficult in the world. It is like attempting to run, tied up in a bag. My pen wants perpetually to career and frolic it away. But it must not be. I must move like Sterne's mule over the plains of Lanquedoc, 'as slow as foot can fall,' and that, too, without one vintage frolic with Nanette on the green, or even the relief of a mulberry-tree to stop and take a pinch of snuff at. I was very sensible, when I began, that I was not in the narrative gait. I tried it over and over again, almost as often as Gibbon did to hit the key-hole, and without his success. I determined, therefore, to move forward, in hopes that my palfrey would get broke by degrees, and learn, by-and-by, to obey the slightest touch of the snaffle. But I am now, as I said, in my hundred and seventh page, which by an accurate computation, on the principles of Locker, taking twenty-four sheets to the quire and four pages to each sheet you will find to exceed a quire by eleven. And yet am I as far to seek, as ever, for the lightsome, lucid, simple graces of narrative.

In 1806, Wirt removed from Norfolk to Richmond. His reputation at this time, while high, was based chiefly on his success as a criminal lawyer. His most celebrated success at Norfolk had been his defense of one, Shannon, accused of the murder of his father-in-law. The evidence was entirely circumstantial, the most damning bit being the fact that a burned piece of a letter, which fitted into some torn scraps found in Shannon's pocket, had apparently

been used as wadding in the gun of the assassin. With the character of his practice Wirt was ill pleased, and he complained bitterly, in his letters to his wife, against "this indiscriminate defense of right and wrong. This playing of the nurse to villains." Nevertheless, his first case at Richmond was of an analogous character, and far more notorious. The venerable Chancellor Wythe had died, and it was universally suspected that his death was caused by poison administered by Swinney, his nephew and heir. The general obloquy which pursued the accused, and the strength of the case against him, was such that Wirt hesitated whether he should accept the brief, and took counsel with his legal acquaintance, and, as always, with his wife. In the end he defended Swinney brilliantly and successfully. The result, while not popular, afforded him, in his own phrase, "a splendid début" before the Richmond bar, and extending his reputation to every part of the State.

The following year a great and unexpected event raised Wirt from local to national fame. Aaron Burr, Colonel in the Revolutionary Army, first boss of Tammany Hall, former Vice-President and almost President of the United States, having alienated the Democratic party by his attack on Jefferson, and incurred the horror of the greater part of his countrymen by the fatal duel with Hamilton, set forth upon what seems to have been the first filibustering expedition. Whatever his schemes may have been,

they were thwarted by the revengeful vigilance of Jefferson, and Burr was brought to Richmond to answer a charge of high treason. After a preliminary examination before Chief-Justice Marshall, a grand jury, of which John Randolph of Roanoke was foreman, indicted Aaron Burr, Herman Blennerhasset and several others, both for treason and for misdemeanor. Burr pleaded Not Guilty, and the case came on for trial in the circuit court before Chief-Justice Marshall and Judge Griffin. Never did cause have a more imposing setting or accompaniments. The greatest of American Judges sat on the bench; the defendant was a man of national reputation, and the charge against him was of international importance. The entire nation stood at attention divided into two warring camps, for to Burr's immediate following were added all the personal enemies of Jefferson, and the larger part of the Old Federalist party. The array of counsel was proportionate to the fame of the occasion and the interest at stake. Of counsel for Burr were two ex-Attorney-Generals of the United States, one of whom had also been Attorney-General of Virginia, and the former Attorney-General of Maryland. With them were joined Wickham, the most subtle pleader of the time, and Martin, whose knowledge of the law was as great as his assertion of it was dogmatic. Against this body of distinguished lawyers Wirt had to win his spurs; but his opportunity was before him, and he so availed himself of it, that, soon after the trial

was begun, he was generally regarded as the mainstay of the prosecution. He was continually relied upon in the long and rather technical arguments on preliminary points. He disputed ably, and not altogether unsuccessfully, with the leaders of the defense on the question whether a *subpœna ducas tecum* should issue to the President for a letter from a public officer, the chief-justice ruling that the subpœna should issue, but that the letter should not necessarily be disclosed if its contents proved on inspection to be of such a character that the interest of the state required them to be kept secret.

The principal argument came, however, when it developed that the Government was unable to show that Burr was present at the armed gathering on Blennerhasset Island, and Wickham suggested "that no person can be convicted of treason in levying war, who was not personally present at the commission of the act charged in the indictment as constituting the offense." About this proposition raged the great and decisive conflict. Of the speeches made, Wirt's is the best known. He was seriously hampered by the technical nature of the point in dispute, which left little room for the exercise of his powers of rhetoric. But one passage of his address, that in which he pictured Blennerhasset's Island as Eden and Burr as the tempter, is found in all standard collections of American Eloquence, and forms a favorite subject for declamation. The argument was unavailing. The decision of the chief-justice

threw out the bulk of the Government's evidence, and the jury returned a verdict of acquittal. Burr was indeed bound over for a further trial in Ohio, a proceeding at which that defendant privately sneered at as a concession of the chief-justice "to conciliate Jack Cade," but the Government did not care to press the case further. Wirt, at least, came from the arena of this unsuccessful contest with a vastly enhanced reputation.

In 1807, the "Leopard" fired on the "Chesapeake," and brought to a head the long growing irritation in the United States against the high-handed proceedings of England on the high seas. The middle and southern states clamored loudly for war, and Wirt's facile spirit was moved by the desire for military glory. In company with several kindred souls he projected a "legion," which he was to command as brigadier-general, while his associates were to be the colonels, majors, and so forth. With some humor, for once wholly unconscious, Wirt dilates in his correspondence, on the eloquent hand-bills by which this command was to be collected. The projector's ardor was considerably dampened by vigorous opposition from the jealous dignitaries of the state militia, and the legion was dead in fact even before the settlement of the Chesapeake incident put an end to all immediate prospects of war. It is probable that, in the case of Wirt, there was active domestic interference besides, for when the War of 1812 finally broke forth,

we find him refusing a commission from President Madison on the ground of his duties to his family. This did not prevent him from raising a local corps of flying artillery for the defense of Richmond when threatened by a British squadron. The efficacy of this force was never tested in actual combat, and, after a short period in camp, during the latter portion of which they grumbled outrageously after the usual fashion of new levies, they were disbanded, and Wirt's military career came to a grateful close.

Meanwhile Wirt had risen to the head of the Virginia bar. The success of his protégé was viewed with pleasure by Jefferson, who expressed a desire to avail himself of such valuable abilities, and suggested that Wirt stand for congress. This Wirt declined to do, significantly renewing his protestations that his first care must be to provide for his wife and family by the active exercise of what had come to be a lucrative practice. He came forward, however, with his pen in a vigorous defense of Madison, who had been regarded as Jefferson's logical successor, but was encountering active opposition from the radical wing of his party, who disapproved of his connection with the Federalist and sought to supplant him with Monroe. This in no way interrupted the friendly relations between Wirt and Monroe, to whom Wirt wrote personally explaining his motives. It may be noted that Wirt's letters were largely occupied with a defense of the "caucus," an institution which had just been intro-

duced into our political system, and against which the objectors, headed by the irreconcilable Randolph of Roanoke, were directing their heaviest artillery.

In consequence of this partisanship, Wirt was, against his own wish, placed in nomination for the Virginia House of Delegates, and was elected, greatly to his own surprise, by an orator-loving constituency. He served but one year, steadily supporting the Jeffersonian policies, and retired, somewhat disgusted with the acrimonies and personalities that marked the political period. Madison having succeeded, Wirt refused the proposal of his friends to advocate his advancement to Secretary of State in the new cabinet, the recognized stepping-stone to presidential honors, remarking that he was "about as fit to be Pope of Rome," and could not "sacrifice his wife and family on the altar of political ambition." He looked with more favor upon the post of Attorney-General, now vacant by the resignation of Rodney, but Madison, after some hesitation, appointed Pinkney, whose great reputation might outweigh Wirt's more personal claims.

At this time Wirt was appointed senior counsel to defend Jefferson, who had been made defendant in a suit for trespass, in the United States Circuit Court at Richmond, for acts done in his official capacity as president. The case, which was very noted at the time, and was called the "Batture Case," arose from the appropriation by adjoining landowners at

New Orleans of accretions to their land along the river front, and their expulsion therefrom, under Jefferson's direction, by a *posse comitatus*, notwithstanding a contrary judgment of a local court in a proceeding to enjoin as a nuisance the erection of structures on the disputed beach. In spite of the advocacy of Wickham, Judges Marshall and Tucker dismissed the case for want of jurisdiction.

A short time after this, the position of United States District Attorney at Richmond falling vacant, Madison had the gratification of bestowing it upon his friend, who was so far from soliciting it that he had written to Madison suggesting the appointment of Upshur. It is interesting, as marking Wirt's liberal views in matters political, that within a year after the Hartford Convention, he frankly stated that his candidate was a Federalist, and urged that this should not constitute a bar in view of his unique personal fitness.

Wirt was now called to practice before the Supreme Court of the United States. His delight and self-gratulation, as exhibited in his private correspondence, was naïve and characteristic.

In his first case it was his fortune to be opposed to the great Pinkney. Wirt welcomed the contest, declaring: "The blood more stirs to rouse the lion than to hunt the hare.' I should like to meet him." He did not, indeed, at this time entertain the common high opinion of Pinkney's abilities. But opposed on the floor of the court to all the prestige

and assurance of his great adversary, Wirt's youthful nervousness seems to have reasserted itself, and he reflected with bitterness that he had fallen below his own reputation. His second effort was more satisfactory. It was a prize case, a proceeding likely at that time to attract popular interest, and the charm of Wirt's social qualities had produced their effect on the society and notabilities of Washington. The court was thronged with his friends and admirers, his sensitive and elastic nature responded to the occasion, and his argument held his audience for four hours and a-half and won him the congratulations of many excellent critics, among whom he mentions Hopkinson, Walsh, Wheaton, the Abbe Corea, and Commodore Decatur.

In October, 1817, President Monroe tendered to Wirt the position of Attorney-General of the United States, vacant by reason of Pinkney's resignation. Wirt was now connected with an iron foundry which had some government contracts, and hesitated as to the propriety of accepting, until he had stated the facts to the President and cabinet. Reassured on this point, he accepted with alacrity, and thus began the most useful period of his career. He came to the office at a most propitious time. The attorney-general had only within a few years been raised from a mere casual adviser of the President to a full cabinet officer, and the office wanted only a distinguished incumbent to establish its proper weight in national affairs. Moreover the humilia-

tions of the late war had resulted in the salutary truce from political warfare, which has been styled the Era of Good Feeling. The Legislators returned to the ruined capitol in a chastened frame of mind, willing to forget past animosities. The Federalist party had committed suicide, and the Democratic radicals were equally discredited. The Government was in the hands of the best men in the nation. The country at large was experiencing the favorable reaction which comes after war. Wirt was therefore able to take up the duties of his office without experiencing the strife and intrigue which were so foreign to his tastes.

Wirt's labors in his new calling were real and ardent. He was the first who had brought to the new office the full weight of first class abilities. Pinkney, his most famous predecessor, had never regarded the attorney-generalship as his first objective, nor relinquished for it any part of his large private practice. In fact, he had promptly resigned on being required to remove from Baltimore to Washington. Wirt set himself to give to his office an effectiveness and system which it has never since lost. It was at his instance that the opinions of the attorneys-general were first collected and preserved. Of his actual attention to work, some idea may be gathered from the fact that his opinions comprise more than one-third of the volume published by the Twenty-third Congress, containing the opinions of all the attorneys-general up to that time.

And of the numerous cases in which he was called to represent the Government, many were of the first importance. It was the period when the diverse ideas which had been poured in solution into the national crucible were slowly crystallizing into something like concrete form. The relations of the states and the Central Government were being gradually defined, and almost every case involved new and grave issues and was the object of public interest. The meagre reports afford little information as to Wirt's labors in the particular case, but some resumé may be given of a few of the most important cases in which he appeared, to show the supreme importance of the issues involved. The Dartmouth College case is too well known to require comment. In it Wirt was for the first time opposed to Webster, and lost, greatly to his chagrin. Chief-Justice Marshall in an opinion, delivered without citation of any case authority, ruled that the Charter of the College, granted before the Revolution, could not be invalidated or impaired by the legislative enactments of the new state government. Wirt could, however, console himself with the reflection that the principles for which he contended had already been denied by the Supreme Court in their previous decision in *Fletcher vs. Peck*.

At the same term two other great cases were decided. In *Sturges vs. Crowninshield*, the question at issue was the right of the new state of New York to discharge preëxisting debts. Conformably with

the previous decisions, it was held that the state could not do so. *McCullough vs. Maryland* was an attempt on the part of Maryland to tax the United States Bank. On trial, Maryland attacked the constitutionality of the bank's charter. Marshall ruled that the charter was constitutional, and that, as the taxing power might be used to destroy, the state had no such power. The case of *Cohens vs. Virginia*, in 1821, presented a very important question. It was therein determined that the Supreme Court had jurisdiction when the appellant was a citizen of the state which state was the plaintiff in state court and the appellee in the appeal. In the case of *Gibbons vs. Ogden*, Wirt had the powerful assistance of Webster. The case was one of the first importance, involving the right of the state of New York to grant a monopoly of steam navigation within its borders. Wirt's argument was long and powerful, and was considered one of his best. The Supreme Court sustained his contention that the act of this state was *ultra vires*, as being an interference with the power of congress to regulate commerce.

In the early days of his career as attorney-general, Wirt found himself in Baltimore, engaged in the prosecution of some mail-robbers, and applied for admission to the Maryland bar. A rule requiring a two years' residence within the state lay in the way; but Maryland was jealous of Virginia's claim to her distinguished son, and Wirt was admitted to all the privileges of the bar, on the plea that he was

entitled to practice thereat as attorney-general. As a result, Wirt came into a constantly increasing private practice in Baltimore and the vicinity, which had the effect of gradually weaning him from his inconveniently distant clients in Virginia. Another result was that he was brought into constant conflict with Pinkney, who resented this invasion of his own particular domain, and an ill-feeling arose in consequence which came near involving the parties in a duel. Fortunately the question more particularly at issue was amicably settled, and Pinkney's death, which occurred not long after, left Wirt the undisputed head of the Baltimore bar.

His appointment as a cabinet officer had in no way made a party man of Wirt. He made this perfectly clear, on the death of Judge Livingston, by warmly advocating the appointment of Chancellor Kent to the Supreme Bench, in spite of the latter's well known Federalist principles; an advocacy in which he was joined, though with less warmth, by Calhoun. As President Monroe had already offered the vacant seat to Smith Thompson, his Secretary of the Navy, the matter came to nothing, and Kent was denied his proper place on the highest American tribunal. At the close of Monroe's second term, in the general scramble for the Presidency which ensued between the Secretaries of State, of War, and of the Treasury, the Speaker of the House, and the most popular and successful General of the Army, Wirt, following the lead of Monroe, refused

to be drawn into the conflict, assigning reasons for his non-interference which sound strangely to the modern ear, but have not entirely lost their weight. In a letter to a friend, he says:

With regard to the Presidential contest, I am of the opinion that I have nothing to do with it. And I will tell you why. In the first place, I think that, according to the genius of our Government, the President owes it to his Country to abstain from the exercise of the slightest influence in the choice of his successor. Even the intimation of his opinion upon the subject, considering the factitious weight which he derives from his office, would, in my opinion, be a departure from principle, as having a tendency to lead to a result subversive of the whole fabric of our republican institutions,— thus enabling a President to appoint his successor. And in my opinion it is not enough that the President observe the most sacred silence upon this subject, but all who hold the relation to him which I do, and who might, therefore, be suspected of merely echoing his sentiments, are equally bound to observe it. As I have continuously forbore to make the Attorney-General a partisan in this election, by any personal appearance in the canvass, either on the one side or the other, so I am determined that nobody else shall entrap me into a partisan feast, or any other situation which might be considered as taking a side either with the one candidate or the other.

The issue of that memorable struggle, and the bitterness which it engendered are well known. The election was thrown into the House of Representatives, and Adams, who, in spite of his great talents and unquestioned virtue, was in no way the popular choice, was elected president. A rancorous Opposition at once developed, asserting that the new administration was the result of chicanery and intrigue,

and ought to be opposed, even though its members were, in the words of an opposition leader, "as pure as the angels at the right hand of the throne of God." To meet this the new President adopted a policy of conciliation, retaining, so far as might be, the cabinet of his predecessor, and endeavoring, so far as in him lay, to recall the vanished Era of Good Feeling. Wirt was retained as attorney-general, and continued to exercise the duties of that office for four years longer. They were the busiest years of his life, and probably the happiest. His numerous family was secured from want. He found exercise for his social qualities in the entertainment of Lafayette, then on his progress through the United States; and indulged his learning and fancy in a tour of Europe. The small honors which never ceased to elate him, came thick and fast. He was elected Professor of Law and President of the University of Virginia, but declined, not choosing as yet to retire from the scene of his activities. He was always in great demand for public gatherings and addresses. Two of these are worthy of note. The most notable was before the literary societies of Rutger's College, where he delivered an address on the educational system which clearly showed his deep prior interest in that subject, and, for style and matter, easily deserves to rank among the first of his reported speeches. The second was momentous from the unique importance of the occasion. Jefferson and the elder Adams, the great Democrat and the great

Federalist, had died on the anniversary of the national independence. The occasion was made a national one, and Wirt was appointed to deliver the joint eulogy in the Hall of Representatives at the Capitol. His address on that occasion is well known, but is not fairly representative of his abilities. The sentimental importance of the occasion no doubt led him to overdress his language with those flowers of speech for which he had always a predilection. It suited his audience, however, and was by them, in formal Resolution, "particularly recommended to the youth of our country, as containing a most chaste and classic model of eloquence, and at the same time furnishing the noblest examples of pure and disinterested patriotism, and of an expanded philanthropy, embracing in its beneficence all mankind."

Before the end of Adams' term of office it became evident that Jackson would be his successor. This raised the question of Wirt's future. He had been so long identified with the office of attorney-general that some of his friends seem to have advised him that he was entitled to retain it irrespective of presidential changes, for he wrote to Monroe to ask counsel on the matter. But the prudent ex-president strongly advised against the raising of a point which was in after times to recur and bring about the first and only impeachment of a President. Jackson was elected, and Wirt was not asked to remain in the cabinet. This was no doubt fortunate

for all parties; since Jackson was determined to fill his immediate household with his personal supporters, and his first cabinet soon made way for his famous "Kitchen Cabinet."

Wirt now cast about for a new field of activity, and decided, after contemplating New York, to settle in Baltimore, where he could be near the Supreme Court and at the same time enjoy his extensive private practice. He abandoned with reluctance his adopted state. In a letter to a friend he says:

Virginia will ever be dear to my heart, settle and die where I may. I love the State and the people. Men are there far dearer to me than any others I can ever know. They are such as I shall not encounter again this side of Heaven. It is not choice, but fortune, that separates me from the State.

In Baltimore Wirt continued his practice, going frequently to Annapolis and Washington. On one occasion he journeyed to Boston, where he had been especially retained in an equity case, and had no less an antagonist than Webster, and his reception was so flattering that he returned elated beyond his wont.

The two most important cases in which he was concerned during this later period were the Impeachment of Judge Peck, and the Cherokee case. Both were of national importance, and in both he was retained for the unpopular side. As regards the first mentioned, Peck, who was a Federal Judge for the District of Missouri, had decided one of several land cases. His opinion, either at his own instance or that of his friends, was published in a

newspaper, at that day an unusual proceeding. This was construed as a challenge by the counsel for the unsuccessful party, who accordingly rushed into print with an argument in which the opinion and reasons of the Judge were treated with scant ceremony. Peck, in return, committed the lawyer to prison for twenty-four hours, as in contempt, and suspended him from practice for eighteen months. This would seem to afford a slight basis for impeachment at the present day, when the power of the federal judges has been less closely scrutinized, but at the time it recalled the Federalist "Alien and Sedition Acts," and called down the wrath of the radical Democrats. Peck was impeached. And only the extravagance of some of his enemies, and the able argument of Wirt, prevented his conviction in the senate. The case involved the whole power of these courts to punish for contempt, and its issue added greatly to the prestige and authority of the federal courts.

The Cherokee case, on the other hand, presented an extreme phase of the successful defiance of Federal authority by a State. The Cherokee tribe inhabited lands in Georgia under treaties with the United States Government. The Government subsequently agreed with the state of Georgia to remove the tribe to a new reservation west of the Mississippi, but neglected to do so. Meanwhile the tribe made great progress in the domestic arts, and showed a lively disposition to remain in their old homes.

They even went so far as to hold a convention, and to draft a constitution as for a separate government within the territorial limits of Georgia. This exhausted the patience of the citizens of that state, who proceeded to pass a series of harsh and vexatious laws, dissolving and annulling the tribal organization and laws of the Cherokees, and at the same time denying them all the rights of citizens of the state. The unfortunate Indians, who thus found themselves the victims of Federal neglect and State oppression, engaged Wirt as counsel. By his direction a bill was presented in the Supreme Court of the United States to enjoin the State from enforcing its new statutes. A storm of obloquy at once descended upon Wirt, for the Indian was neither desired nor loved, and the lawyer was accused of disloyalty to his own race. This he bore as best he could, reiterating his faith in the justice of his clients' cause. Meanwhile Georgia showed a determination to disregard the decision in any event. While the case was pending, a Cherokee, condemned by a state court for the murder of another Indian, was executed, in defiance of a writ of error granted by the United States Supreme Court on the very grounds upon which the injunction was asked. At the trial Wirt and Sergeant appeared for the Cherokees, but the state was not represented. Wirt had been in doubt as to the Court's jurisdiction, and had taken counsel of Kent, who reassured him. The event showed the wisdom of his doubt, for Chief-Justice

Marshall, with an expression of regret, declared that there was no jurisdiction. Georgia treated the entire proceedings with contemptuous indifference, and forthwith passed a severe statute aimed at certain missionaries, who were working among the tribe. These men were arrested and imprisoned, and a writ of error granted by the Supreme Court. Wirt and Sergeant again argued, without defence, and a decree was made reversing and annulling the judgment of the Georgia courts and ordering the release of the prisoners. This decree was disregarded, and as Jackson, long at outs with Marshall, refused to interfere, the missionaries continued to languish in prison. Perceiving their helplessness, the Cherokees submitted to necessity, and were removed to their new homes, west of the Mississippi.

Having been brought into opposition to the imperious President, Wirt was naturally among those opposed to his reelection. He was appointed a delegate to the Whig convention from a Baltimore district, and announced himself a supporter of Clay. But, before this convention met, he found himself tendered the nomination, at the hands of one of the strangest parties that ever rose above the surface of American politics. The Anti-Masons had but one political tenet, which was the destruction of all secret organizations, and, more particularly, the Masonic order. The party came into being during the excitement which followed the disappearance of Morgan, the real or pretended revealer of the

secrets of free masonry. It was fairly strong in some of the northern states, and having one very pronounced idea, made a noise out of all proportion to its actual size. The nomination had been evaded by several experienced politicians when it was finally tendered to Wirt. The latter faintly protested that Clay was the logical candidate of all who were opposed to Jackson; but it was readily answered that if Jackson was a "Royal Arch," Clay was a "High Priest," and equally unacceptable. Wirt thereupon wrote formally to the convention, stating that he had been himself a freemason in his youth, and, while he had never taken a Master's degree nor attended a lodge in thirty years, he could not believe so ill of the order as to suppose that the fate of Morgan was more than the unauthorized act of individual members. This he declared to be no true masonry, and worthy of all condemnation and destruction. If these views were satisfactory to the convention, he expressed his willingness to stand as their candidate. Whether or not this reply was agreeable to the delegates is doubtful; but having already been thrice refused, they thought best to close with even this halting acceptance, and Wirt was formally launched as their candidate.

Wirt's hope was that the coming Whig convention might see fit to endorse him as their candidate, in order to unite all opposition to Jackson into one sufficient body. He stated to his friends that he had accepted the nomination only because he thought

it wise to divert the Anti-Masonic vote from Jackson, to whom the bulk of it would probably have gone in the event of the party's dissolution. But in this he was disappointed. Clay was the idol and the perennial candidate of the "Silver-gray" Whigs, and, if this had not been so, the Anti-Masons, alienating by their platform the entire membership of all American secret organizations, would have lost for their candidate almost as many Whig votes as they themselves could bring him. Clay was nominated by the Whigs; and Wirt was left in a difficult position, requiring much explanation. He would gladly have withdrawn, but could not, and the ensuing election found him with only the seven votes of Vermont to show for his pains. It was a bitter blow to his pride. And when an Anti-Masonic newspaper proposed his name for the next presidential term, he met the suggestion with a decided negative.

The shadows had now begun to close around him. His wife was ailing, and his own health was broken. His former political leaders, and his bosom friends, one by one, were dropping away. In Baltimore he found an ambitious aspirant for his position at the head of the bar in young Taney, destined to be one of the greatest, as he was the most abused and vilified the chief-justices. Politically, he was without a party. But the heaviest blow fell in the death of his youngest and favorite daughter. Of her he said: "She was not only the companion of my studies, but the sweetener of my toils. The painter,

it is said, relieved his aching eyes by looking at a curtain of green. My mind, in its hour of deepest fatigue, required no other refreshment than one glance at my beloved child, as she sat beside me." From the day of her death he was never the same man.

His last flash of enthusiasm came in a project to establish a Colony of Germans in Florida, and for a time he entered into utopian schemes with all the ardor of his earlier years. But the emigrants proved shiftless and untrustworthy, and the project ended in failure. To a friend he wrote, with a flash of his old humor: "As to the Germans, I am prepared now to write a treatise *De Moribus Germanorum*."

The death of his oldest daughter was a prelude to his own. He complained that he could not sing as formerly, that when he tried to do so "my voice sounds to me like bitter mockery, and my song ends in a sigh." To a remaining friend he wrote pathetically:

I look upon life as a drama bearing the same sort, though not the degree of relationship to eternity as an hour spent in the theatre, and the fictions there exhibited for our instruction, do to the whole of real life. Nor is there anything in this passing pageant worth the sorrow that we lavish on it. Now when my children or friends leave me, or when I shall be called to leave them, I consider it as merely parting for the present visit, to meet under happier circumstances when we shall part no more.

The following month he repaired to Washington to attend the term of the Supreme Court, at which

he had several important cases pending. Coming from an overheated hall into the air of a damp, raw day, he contracted an illness which turned out to be erysipelas. When he was told the nature of the disease he said that it was not his old enemy, and that he feared it. It was soon apparent that his exhausted system would not support the vigorous treatment necessary to stay the disease. In a few days his condition was practically hopeless, and his friends and family were summoned to take their leave. Prayer was offered at his bedside by an attendant clergyman, in which, so far as it concerned the future welfare of his family and his own acceptance with Heaven, he seemed to join; but when a petition was offered that he might be restored to health he said distinctly: "No! No!"

His death occurred on February 18th, 1834. The news was received over the country as an event of national importance. The Supreme Court, then in session, adjourned for the day; and a session of the bar was forthwith held, and addressed by Webster. Southard was selected to pronounce a eulogy, and a request was made that the body be interred at Washington under a monument to be erected by the Bar. On the following day the Attorney-General presented a record of these proceedings in the Court, where Chief-Justice Marshall, in replying, said:

We, too, gentlemen, have sustained a loss it will be difficult, if not impossible to repair. In performing the arduous duties assigned to us, we have been long aided by the diligent search and

lucid reasoning of him whose loss we unite with you in deploring. We, too, gentlemen, in common with you, have lost the estimable friend in the powerful advocate.

Still greater honor was paid by the Houses of Congress, which adjourned to enable their members to attend his funeral, a proceeding never before accorded except on the death of a member of congress. His body was attended to the grave by the President and Vice-President, the Cabinet, the Bench and Bar of the Supreme Court, the Diplomatic Corps, the Members of both Houses, the Officers of the Army and Navy, and a great concourse of private citizens. Marshall, Jackson, Adams, Calhoun, Clay, Webster, Van Buren, Story, Southard, Taney, Binney, Sergeant, Everett, Cass, Scott, Macomb, Rogers and Chauncey were some of the notables who stood beside his grave in the National Cemetery.

On the ensuing day, Adams, in the House, secured consent to an amendment of the record of the previous day so as to show that the adjournment had been "to give the Speaker and members of the House the opportunity of attending the funeral obsequies of William Wirt."

A personal friend has stated that: "In the prime of his life, Mr. Wirt was remarked for his personal beauty. With a tall figure, ample chest and erect carriage, there was no great appearance of muscular strength, but a conspicuous ease and grace of motion. His head was large, and in good proportion

to his frame; the features of his face strongly defined. A large nose, thin and accurately formed lips, a chin whose breadth gave to his countenance an approximation to the square rather than to the oval outline, clear, dark-blue eyes, looking out beneath brows of widest compass, and the whole surmounted by an expanded and majestic forehead. . . . A curled, crisp and vigorous growth of hair, in his latter days almost white, clustered upon his front, and gave an agreeable effect to the outline of his head and face." His portraits show this description to be sufficiently accurate. The first thing to be remarked is his strong resemblance to the poet Goethe. The face is that of a fine solid gentleman of the old school, but also that of a sentimentalist. One is not surprised to hear that he attempted poetry and that he played the flute.

In summing up his character and attainments, it is impossible to credit him with genius. Talent he had in profusion. He possessed an adaptability which carried him on from a raw German boy to the pink of old Virginia gentility, and from a scatter-brained young circuit-rider to the steadiest among the brilliant lights of the bar. He had a vivacity of mind and of fancy which carried him in full career against the object of his more immediate ambition. And, with it all, he had an unfailing good judgment, which made him his own best critic, enabled him to appraise at its true value the glittering and superficial, and impelled him through life

to strive continually to be the solid advocate rather than the showy orator. In this he occasionally failed, but he never ceased to deplore his own excesses, and to hark back to his ideals, whom he often declared were John Locke and John Marshall.

During his life he crossed swords with all the greatest lawyers of that great period of legal history, with Pinkney, Webster, Sergeant, Harper, Randolph, Taney, and many others. Jefferson, Madison, Monroe, Kent, and Adams were his personal friends. Marshall was his avowed model. For Calhoun he expressed the warmest regard, while repudiating the doctrine of nullification. Only for Edmund Randolph and Pinkney does he seem to have entertained feelings of antagonism. These were serious men, conscious of power, and domineering by nature. And it is probable that their majestic pose was an offense to the lighter disposition, and an incentive to the mischievous wit of the younger man.

With all his brilliant qualities, there was nothing meteoric in Wirt's career. Its history is one of steady and gradual achievement. From briefless barrister to neighborhood lawyer, from country practitioner to leader of the Richmond bar, to United States District Attorney, to Attorney-General and a national reputation, there was never a step of his progress that was not marked by solid and substantial effort. Something he owed to his social qualities, and to the end of his life he could never hope to

enter into the *sanctum sanctorum* where Marshall and Kent deduced and expanded the Science of the Law. But his work was always careful and conscientious, and in his later years became so close that Calhoun was moved to advise him to "study less, and trust more to his natural genius."

Of his social brilliancy and conversational ability the memory still lingers in Richmond and Baltimore. Many stories are told of him. It is said that on one occasion, on a wager with an outsider, he held a party of his intimates, unconscious of the flight of time, for an entire night. The only pause in his brilliant flow of conversation was when he took snuff from his large box open on the table before him. At last he threw open the window and laughingly showed his surprised friends that the sun was high.

His faults were sufficiently apparent. But they were not such as to cost him friends. His early excesses were injurious to no one but himself. The over-shrewdness of his maturer years was attributable to his solicitude for his numerous family. His vanity was not of that kind which undervalues or insults, but was a simple and childish pleasure in achievement, as easily gratified as excited; and he himself was the first to see and laugh at it. It is doubtful if any man at his death was more generally regarded and loved.

The flattering opinion of his contemporaries was thus summed up by Adams in his address to the

House, a speech which has the merit of being a spontaneous effort, and not a formal eulogy.

If a mind stored with all the learning appropriate to the profession of the law, and decorated with all the elegance of classical literature; if a spirit imbued with the sensibilities of a lofty patriotism, and chastened by the meditations of a profound philosophy; if a brilliant imagination, a discerning intellect, a sound judgment, and indefatigable capacity, and vigorous energy of application, vivified with an ease and rapidity of elocution, copious without redundance, and select without affectation:—if all these, united with a sportive vein of humor, an inoffensive temper and an angelic purity of heart—if all these in their combination are the qualities suitable for an Attorney-General of the United States, in him they were all eminently combined.

JOHN MARSHALL.

JOHN MARSHALL.

1755-1835.

BY

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TO the lawyer and layman alike, John Marshall stands preëminent as the greatest of our judges. The Reports of our Supreme Court during the period of his chief-justiceship contain the record of his decisions and prove the power of his intellect. A closer study of the man himself, reveals a personality of rare charm, and a character at once sweet, simple, and strong. Save Lincoln and Lee, no other is so attractive among our public men. He constantly reminds us now of one, now of the other. Indeed, in the fundamental elements of character, all three men were alike. Differences there are on the surface; but these can nearly all be traced to environment. Lincoln was a product of democracy living under comparatively primitive conditions; Lee of an aristocracy which had been settled for generations on broad acres. The peculiar economic and social conditions surrounding each no longer exist. Marshall's environment, on the

other hand, was not extreme. It contained democratic and aristocratic elements. In his boyhood and young manhood he was not rich, and he did not want. He is, therefore, the product of what we may call, by comparison, normal American conditions. Our future great men, when they have the same fundamental elements of character, will probably resemble Marshall more nearly than they will resemble either Lincoln or Lee. Marshall had a good knowledge of common law and equity; he was a master of International law and admiralty; but his title to enduring fame as a judge rests on his great constitutional cases. These cases gave him an opportunity to perform services of supreme importance to his country. That the reader may gain a knowledge of the nature of these services is the object of this essay. To this, some insight into his life and character is necessary, as well as a foreword in regard to the Constitution.

The adoption of the Constitution, not only created a new national government, it established a new Federal State. Under the Constitution every citizen, not a resident of one of the territories, is subject to two governments, neither of which is superior to the other; the reserved powers of the States being as much protected by the fundamental law as the delegated powers of the Federal Government. The possibility of maintaining a Federal State, embodying these elements of dual sovereignty, was the experiment inaugurated by the people of the United States

in 1787. One of the merits of the Constitution is its simplicity and clearness. Nevertheless, conflicts between Federal and State Legislative and Executive action are inevitable. The powers of the Central Government are expressly enumerated; all other powers are reserved to the States. But the framers of our Constitution did not attempt to specify the manner in which either the Federal or the State Governments should exercise their respective powers. Had they done so, by depriving Congress and the State Legislatures of all discretion in the choice of means, they would have defeated the objects for which the powers were granted or reserved.

Since conflicts between the central and local authorities are bound to arise, it is essential that the people, taken as a whole, should recognize some one body as possessing the right to settle finally and authoritatively disputes arising out of different interpretations of the Constitution. If we did not have such a body, or having it in legal theory, it should lose the confidence of the people, so that they would no longer accept its interpretations of the Constitution as final, our Federal State would soon become unworkable. To-day we regard the Supreme Court as the body charged with the peaceful settlement of constitutional questions, and recognize the finality of its decisions on matters which affect the organization and power of our governments. The Supreme Court owes its position as arbiter in our Federal system, primarily to Marshall's decision in *Marbury*

vs. Madison; but the ready acquiescence given to the decisions of the Court on Constitutional questions, the feeling of respect for the Court itself, is in great part the result of his long judicial career, his clear analytical mind, and his stainless character. Marshall, as a member of Congress, speaking of Washington, said:

More than to any other individual, and as much as to one individual was possible, has he contributed to founding this, our wide spreading empire. . . .

So we may say of him, more than to any other individual, and as much as to any individual was possible, he contributed to the present position of the Supreme Court as the accepted interpreter of our fundamental law; a position which has been in the past, is now, and always will be essential to the preservation of the Federal State created by our Union under the Constitution.

But Marshall did more than compel the recognition of the Supreme Court as the arbiter of our Federal System. We are a democratic people; and in a democracy it is essential that the people should understand, and understanding love the fundamental law on which their government is based. This was especially true of us, because we started handicapped by the existence of slavery in a portion of the country, and a nation cannot endure half slave and half free. The crisis of 1860 was inevitable; but when it came it found the people of the north, taken as a

whole, understanding the Constitution and willing to make any sacrifice to preserve the Union. Again, to Marshall, more than to any other individual, and as much as to one individual was possible, we owe this understanding and this love.

John Marshall was born on the 24th of September, 1755, in a small place called Germantown, in what afterwards became Fauquier County, Virginia. Germantown, now called Midland, is a little settlement on the Southern Railroad a few miles south of Manassas.¹

At Midland all they can show you now, relating to Marshall, is a small, rude heap of bricks and rubbish,—what is left of the house where he was born; and children on the farm reach out to you a handful of the bullets with which that sacred spot, and the whole region were thickly sown, before a generation had passed, after his death.

He was the son of Thomas Marshall and Mary Islam Keith; the eldest of fifteen children, all of whom lived to be married.² His grandfather, who bore the same name as his celebrated descendant,

¹ John Marshall, by the late Prof. James B. Thayer, *Riverside Biographical Series*, pp. 3-4. Prof. Thayer's essay is the outcome of an address delivered by him at Cambridge on February 4th, 1901, and an article in the *Atlantic Monthly* for March, 1901. Professor Thayer's address as delivered at Cambridge, together with the other addresses delivered on "Marshall Day," have been collected and reprinted in three volumes edited by Hon. John F. Dillon. This collection is hereafter cited as *Dillon's Marshall*.

² On March 22d, 1818, in a letter to Joseph Delaplaine, Esq., of Philadelphia, who was then publishing his "*Repository of the Lives and Portraits of Distinguished American Characters*," Marshall gives, in a few paragraphs, his autobiography. The late Justice Horace Gray

lived in Westmoreland County near the mouth of the Potomac. Marshall supposed that his great-grandfather migrated from Wales,³ but recent researches indicate that the family were really descended from a Captain of Cavalry in the service of Charles I, who came to Virginia about 1650.⁴ His grandmother was Elizabeth Markham, a native of England. John Marshall, the elder, was a planter, though apparently not a very successful one, for his son Thomas, after inheriting his father's plantation called "The Forest," and about the time of his marriage, migrated to the then wild and frontier part of Virginia, where his son John was born. When Marshall was about ten years old his father removed some thirty miles farther west to Oakhill, in the higher part of Fauquier County under the Blue Ridge. The house, which is still standing, is beautifully placed on high rolling ground "looking over a great stretch of fertile country."⁵ The natural beauty of the immediate surroundings is greatly enhanced by the background of forest-covered mountains. At the time, this part of Virginia was sparsely settled by a race instinctively social, yet, of necessity, living in rude simplicity. Marshall al-

discovered in a Boston book-store a small pamphlet containing a reprint of this letter. It will be found in full in Justice Gray's address on Marshall. See Dillon's *Marshall*, vol. I, 54-56.

³ See *Autobiographical Sketch*, Dillon's *Marshall*, vol. I, 54.

⁴ Thayer's *Marshall*, p. 10, note.

⁵ Thayer's *Marshall*, p. 5. In Howe's *Virginia Historical Collections*, p. 262, it is said that the family moved first to Goose's Creek under Manassas' Gap, near the Blue Ridge, before finally settling at Oak Hill.

ways looked back on his boyhood with pleasure. "He ever recurred with fondness to that primitive mode of life, when he partook with a keen relish balm tea and mush; and when the females used thorns for pins."⁶

The beauty of the mountain streams and woods found a response in the delicately sensitive, though not exactly artistic nature of the boy, and developed in him a love of natural beauty which he retained throughout his life. His ardent social nature led him to get all that was good out of the simple hospitality of those with whom he came in contact, while his innate delicacy kept him from being contaminated by the coarser side of this backwoods social intercourse. The outdoor life firmly established his health and formed habits of vigorous physical exercise which tended to preserve it. There are many stories of his athletic powers. At Valley Forge he was known as the fastest runner in the Revolutionary Army, and he was the one man, who, with a running jump, could clear a stick laid on the heads of two men as tall as himself,—six feet. The soldiers gave him the sobriquet of "Silver Heels" because he once ran in his stocking feet, thus showing his distanced competitors the white heels of the blue knit stockings which his mother had made him. There is no account of his running foot races after he became Chief-Justice, but there are many of his fond-

⁶ Howe's Virginia Historical Collections, p. 263.

ness for quoits, a game which he played with great skill and at every possible opportunity.

More important than his native scenery, and the unrestrained social intercourse which prevailed among the inhabitants of Fauquier and neighboring counties, was the influence of his father. In pioneer America it is usually the mother who gives to the gifted son and future statesman, the impulse which in time equips him for action on the larger stage of the scene of his life's work. But of Marshall's mother we know little. There is a tradition in the family that she was a person of great force of character and strong religious faith, and we may well credit the statement of a descendant, that "her son loved her with that chivalrous, tender devotion which made him gentle with all women throughout his life."⁷ But it was of his father that Marshall loved to speak. "My father," he would say to Justice Story, "was a far abler man than any of his sons. To him I owe the solid foundation of all my own success in life."⁸

Thomas Marshall seems to have been a man who combined energy and force of character with the instinct of the student and lover of books. His education was limited, and his fortune a narrow one;

⁷ John Marshall, Third Chief Justice of the United States, as Son, Brother, Husband and Friend, by His Great-Granddaughter, Sallie E. Marshall Hardy, *The Green Bag*, vol. VIII, 479, at p. 480.

⁸ *Life, Character and Services of Chief Justice Marshall*, by Joseph Story, reprinted in an appendix to Dillon's *Marshall*, vol. III, 327. The passage cited will be found at p. 330.

yet he purchased and made himself the master of all the best English works in history, prose, and poetry, and became a surveyor of recognized ability. In default of a school, or that accompaniment of the richer Virginia families, a resident tutor, he at first entirely superintended his son's education. Under the guidance of this reader of good English books, the boy soon developed a love for history and poetry, and at the age of twelve had transcribed the whole of Pope's *Essay on Man*, besides committing "to memory many of the most interesting passages of that distinguished poet."⁹

When Marshall was fourteen years old he was sent to Westmoreland County and placed in a school conducted by the Reverend Mr. Campbell. Here he began the study of Latin, though most probably with indifferent success; for we find that, though he continued to pursue the subject after his return home at the end of the year under the guidance of a Mr. Thomas, the Rector of the parish, then living at his father's house, he never exhibited in after life any special knowledge of the classics or the slightest interest in them.¹⁰ The importance of his return home was not that he read with Mr. Thomas, Horace and Livy, but that he again came into daily personal contact with his father. Speaking of this period of his life, Marshall tells us that his father was his

⁹ Story's Discourse, Dillon's Marshall, vol. III, 331.

¹⁰ In his own account of his education he omits all mention of Doctor Campbell's School.

"only intelligent companion, and was both a watchful parent, and an affectionate, instructive friend."¹¹ A beautiful picture of their relationship! The older man must have had a more profound effect on the younger man's character than merely stimulating his love for English literature. Yet the special intellectual direction of his father's influence should not be overlooked. As we read his judicial opinions we realize that their clearness is due primarily to the logical character of the writer's mental processes; nevertheless, it would hardly have been possible for him to choose, so unerringly, the right words had his English education been as barren of results as his instruction in Latin.

In the spring of 1775, the news of Concord and Lexington came to Fauquier County. Marshall, then nineteen years old, had already begun to read Blackstone, a copy of which was among the books of his father's library.¹² But the father was too strongly devoted to the rights of the colonies for the son not to be filled with enthusiasm for the colonial cause. In May, 1775, we find him, as a lieutenant, drilling a company of volunteers raised in the neighborhood of his home, and he was with Colonel Woodford at the battle of Great Bridge, about

¹¹ Letter quoted by Henry Flanders in his *Life of Marshall*, at p. 6.

¹² "From my infancy I was destined for the Bar; but the contest between the mother country and her colonies drew me from my studies." *Autobiography*, Dillon's *Marshall*, vol. I, 55.

As to the existence, at this time, of a copy of Blackstone in the Library of Thomas Marshall, see Thayer's *Marshall*, pp. 6-7.

twelve miles from Norfolk. In July, 1776, he was appointed Lieutenant in the 11th Virginia Regiment, joining the army at Norristown in the following November. He remained with the army continuously until January, 1780; he was at the battle of Iron Hill which preceded Brandywine, and among the troops which made the unfortunate attack on the Chew House in the Battle of Germantown; he passed the terrible winter of 1777-8, at Valley Forge; took part in the victory at Monmouth; was with Wayne at Stony Point, and with the detachment to recover the retreat of Major Lee after his surprise of the enemy's post at Powle's Hook.¹³ Of the exact part Marshall took in these historical battles, we know little or nothing. Though raised to the position of Captain in May, 1777, he was too young to play any but a subordinate part. Of his temper and courage in the face of privation, his friend Philip Slaughter, a lieutenant in the same regiment, testifies:¹⁴

Marshall was the best-tempered man he ever knew. During the sufferings at Valley Forge, nothing discouraged, nothing disturbed him; if he had only bread to eat, it was just as well; if only meat, it made no difference. If any of the officers murmured at their deprivations, he would shame them by good-natured railery, or encourage them by his own exuberance of spirits. He was an excellent companion, and idolized by the soldiers and his

¹³ An extended account of his Military Services will be found in Flanders' Life of Marshall, Chapter III.

¹⁴ Howe's Virginia Historical Collections, p. 266; see also, *ibid.*, p. 239.

brother officers, whose gloomy hours were enlivened by his inexhaustible fund of anecdote.

He was often employed as judge advocate and in this way came into personal contact with Washington and Hamilton, forming for the former an affectionate regard which he has amply testified to in his life of the first President; and for the latter, the warmest admiration, not only as a statesman but as a man and a patriot.

The real importance of these years of military service lay in the fact, that coming in daily contact with men from all the other colonies, there grew up in him, as in hundreds of others similarly situated, the consciousness of something more than a common cause,—the consciousness of a common country. Marshall went into the war a Virginian; he came out an American; and like that other great Virginian, Washington, an American he remained throughout the rest of his life; loving the soil and people of his native state with all the force of an ardent temperament; a Virginian in his outward aspect, in the tones of his voice, in his courteous manner; but in his heart a nationalist, knowing no divided sovereignty.

About January, 1780, the enlistment of the part of the Virginia troops to which he was attached having expired, Marshall was directed to return home, to take charge of any new troops which the legislature of Virginia might raise. He did not secure a new commission, and though he remained nominally in

the service until January, 1781, and joined the small force under Baron Stuben to repel the invasion of Leslie, and was with the troops collected to oppose Arnold, the real termination of his military services and the commencement of his law studies, took place when he left the main army under Washington. In the early part of the year he attended for a few months the law lectures of Master, afterward Chancellor, Wythe who had just been elected to the professorship of law recently established, by the influence of Jefferson, in the College of William and Mary at Williamsburg.¹⁵ Of his life at Williamsburg, the only information we possess, is the records of the Phi Beta Kappa Society, showing that on May 18th, 1780, "Captain John Marshall, was on that day, balloted for and received." Three days later he was appointed with others, "to declaim the question whether any form of government is more favorable to public virtue than a commonwealth."¹⁶ His experiences at the College had probably little effect on his mental development. No one has recorded that he ever referred to Chancellor Wythe. The latter remained throughout his life a friend and follower of Jefferson. As such, he probably had little intellectual sympathy with his other great, but very different, pupil.

It was in this year, 1780, that he met the beautiful

¹⁵ See the article on George Wythe, by President Tyler of the College of William and Mary, *supra*, vol. I, at pp. 67 *et seq.*

¹⁶ Reprinted in Thayer's Marshall, vol. III, 15.

Mary Willis Ambler, then only fourteen years old, who, at the age of sixteen, became his wife. Her father, was Jacquelin Ambler, said to have been one of the most popular men in the State; her mother was the beautiful Rebecca Burwell, whom Jefferson had courted in vain twenty years before.

The story of Marshall's first meeting with his wife is told in a letter written by an elder sister many years afterward.¹⁷ There was to be a ball in Yorktown, and the two Misses Ambler, hearing that Captain Marshall, lately returned from the war, was expected, looked eagerly forward to an introduction. The elder sister was much disappointed at "his awkward, unpolished manner and total negligence of person." To the younger he became at once devotedly attached, an attachment which that little lady, in spite of his appearance, returned. Later, when he first asked her to marry him, being young and bashful, she said "no," when she meant to say "yes." "The mistake, however," writes the youngest son of the Chief-Justice, "was corrected some time after by the kind offices of a cousin, a Mr. Ambler. Seeing how things were, he sent to the disappointed lover a lock of her hair, cut without her knowledge." Marshall, "supposing she had sent it, renewed his request and they were married."¹⁸ This marriage

¹⁷ Letter of Mrs. Carrington, who was a year older than Mrs. Marshall, written to another sister in 1810. Reprinted in Thayer's *Marshall*, pp. 16, 17.

¹⁸ Letter of Edward C. Marshall to Mrs. Hardy, printed in *Green Bag*, vol. VIII, 481.

took place on the 3d of January, 1783, in Richmond, where her father was then living as Treasurer of the State.¹⁹ They had ten children, six of whom grew to full age.²⁰ On their marriage the young couple settled in Richmond, which was to be thereafter their home. For the greater part of the forty-eight years of their married life Mrs. Marshall suffered intensely from a nervous affliction. Her condition called out the love and sympathy of her husband's deep and affectionate nature. Alike in youth and manhood of stainless purity,—reverent to all women; from the day of his marriage to his wife's death in 1831, he remained her devoted lover. "After all, whatever may be his fame in the eyes of the world," says Mr. Justice Story, "that which, in a just sense, was his highest glory, was the purity, affectionateness, liberality and devotedness of his domestic life."²¹

Before his marriage Marshall had begun his experience in public life, having been sent to the State Legislature from Fauquier County in the spring of 1782. In the fall of that year he was elected by the Assembly one of the Executive Council, a position

¹⁹ This statement is based on the assertion of Mrs. Hardy in Green Bag, vol. VIII, 482. Professor Thayer believed the marriage to have taken place at the "Cottage," the Ambler home in Hanover County. Thayer's Marshall, p. 19.

²⁰ Marshall's letter to Story, June 26th, 1831, printed in Proceedings of the Massachusetts Historical Society, 2d series, vol. XIV, 344, in which Marshall speaks of having lost a daughter six or seven years old, and, within a fortnight, a boy.

²¹ Story's Discourse, Dillon's Marshall, vol. III, 365.

of responsibility, and one which must have taken a great deal of his time. On his marriage and removal to Richmond he resigned his seat in the Council, probably in order to enter seriously into the practice of law.²² He continued, however, to represent Fauquier County in the Legislature until 1787, after which he represented Henrico, the County in which Richmond is situated. While his duties as a Legislator were by no means distasteful to him, social as he was by nature, there is no question but that at this time his sole ambition was to obtain a position of prominence at the Bar, and that he was jealous of anything which interfered with his practice. His early success in his chosen profession is shown by the fact that in May, 1786, two years from the time when, according to his own statement, he began to practice law, we find him counsel in a case of great importance, *Hite vs. Fairfax*, involving the original title of Lord Fairfax to that large tract of country between the head waters of the Potomac and Rappahannock, known as the northern neck of Virginia.²³

²² Marshall, in his autobiography says: "In April, 1784, I resigned my seat in the executive council, and came to the bar, . . ." Dillon's Marshall, vol. I, 50. Story says: "He left that Institution (William and Mary College) in the summer vacation of 1780, and soon after received the usual license to practice law. . . . The courts of law were suspended in Virginia until after the capture of Lord Cornwallis (October 19, 1781). . . . As soon as they were reopened Mr. Marshall commenced the practice of the law, and soon rose into high distinction at the bar." Story's Discourse, Dillon's Marshall, vol. III, 336, 337.

²³ 4 Call's Reports, 42.

Marshall represented tenants of Lord Fairfax, and won his case.

From this time, until his departure to France in the summer of 1797, he gained and maintained, not merely a leading place in his profession, but the leadership of the Bar of Virginia. As this fact has not been generally recognized it needs emphasis. If we turn to the fourth volume of Call's Virginia Reports, which cover the period referred to, we find twenty-nine cases reported in which the names of counsel are given. Marshall's name appears as engaged on one side or the other, in thirteen of these cases.²⁴ Thirteen other lawyers besides Marshall are mentioned in the reports; yet no one, except Marshall, is recorded as being of counsel in more than five cases.

The Duke d'Liancourt, who was in Richmond in 1796, speaking of Edmund Randolph, says: "He has great practice, and stands in that respect nearly

²⁴ The cases besides *Hite vs. Fairfax*, in which Marshall was engaged and in which his arguments are reported more or less at length, are as follows: * *Pickett vs. Claiborne*, 4 Call's Reports, 99 (1787), 102; *Beall vs. Cockburn*, *ibid.* 162 (1790), 180; *Johnston vs. Macon*, *ibid.* 367 (1790), 369; *Hamilton vs. Maze*, *ibid.* 196 (1791), 204; * *Calvert vs. Bowdoin*, *ibid.* 217 (1792), 219; *Braxton vs. Winslow*, *ibid.* 308 (1791), 312; *Tabb vs. Gregory*, *ibid.* 225 (1792), 226; *Commonwealth vs. Cunningham & Company*, *ibid.* 331 (1793), 335; *Ross vs. Gill*, *ibid.* 250 (1794), 251; * *White vs. Jones*, *ibid.* 253 (1792), 256; *Foushee vs. Lea*, *ibid.* 279 (1795), 283; *Tuberville vs. Self*, *ibid.* 580 (1795), 585. In the cases starred Marshall was successful. He doubtless took part in many of the cases in which the names of counsel are not mentioned. For instance, we may be quite certain that he represented the plaintiffs in the case of his father and others against the famous George Rogers Clarke, reported as *Marshall vs. Clark[e]*, 4 Call's Reports, 268 (1790).

on a par with Mr. J. Marshall, the most esteemed and celebrated counsellor in this town.”²⁵

In the volume of Call's Reports referred to, Marshall's arguments are often reported at length. They show the same combination of grasp, clearness, and completeness which distinguishes all his intellectual work. Wirt, writing under the pseudonym of the British Spy, after pointing out that Marshall's voice was “dry, and hard; that his attitude, in his most effective orations, was often extremely awkward,” and that “fancy was never allowed to intrude itself into his discourse,” asks:²⁶

How then, you will ask, with a look of incredulous curiosity, how is it possible, that such a man can hold the attention of an audience in chained, through a speech of even ordinary length? I will tell you.

He possesses one original, and, almost, supernatural faculty: the faculty of developing a subject by a single glance of his mind, and detecting at once, the very point on which every controversy depends. No matter, what the question: though ten times more knotty than the “gnarled oak,” the lightning of heaven is not more rapid nor more resistless, than his astonishing penetration.

* * *

The audience are never permitted to pause for a moment. There is no stopping to weave garlands of flowers, to hang in festoons, around a favourite argument. On the contrary, every sentence is progressive; every idea sheds new light on the subject; the listener is kept perpetually in that sweetly pleasurable vibration, with which the mind of man always receives new truths; the dawn advances in easy but unremitting pace; the subject opens

²⁵ *Travels Through United States*, vol. III (2d ed. 1800), p. 75.

²⁶ *British Spy*, 6th ed., 1817. pp. 96-98.

gradually on the view; until, rising, in high relief, in all its native colours and proportions, the argument is consummated, by the conviction of the delighted hearer.

The success of this gentleman has rendered it doubtful with several literary characters in this country, whether a high fancy be of real use or advantage to any one but a poet.

Another contemporary, Francis W. Gilmer, says:²⁷

So great a mind, perhaps, like large bodies in the physical world, is with difficulty set in motion. That this is the case with Mr. Marshall's is manifest, from his mode of entering on an argument both in conversation and in public debate. It is difficult to rouse his faculties; he begins with reluctance, hesitation, and vacancy of eye; presently his articulation becomes less broken, his eye more fixed, until, finally, his voice is full, clear, and rapid, his manner bold, and his whole face lighted up, with the mingled fires of genius, and passion: and he pours forth the unbroken stream of eloquence, in a current, deep, majestick, smooth, and strong. He reminds one of some great bird, which flounders and flounces on the earth for a while, before it acquires the impetus to sustain its soaring flight.

The most celebrated case with which Marshall was connected, and the only one in which he appeared as counsel in the Supreme Court of the United States, was *Ware vs. Hilton*, the case of the British debts, which was decided in 1796.²⁸

It was a case of great practical importance, arousing wide-spread public interest, and involving constitutional questions of first magnitude. Indeed, with the exception of *Chisholm vs. Georgia*, it was

²⁷ *Sketches, Essays and Translations*, by Francis Walker Gilmer (Baltimore 1828), pp. 23, 24.

²⁸ 3 Dallas' Reports, 199.

the most important case decided by the Court prior to Marshall's nomination as chief-justice. The Court decided that the Continental Congress had the power by Treaty to revive a debt discharged under the laws of a state, and that the 4th Article of the Treaty of Peace was designed to enable British subjects to recover debts due from Americans, even where the debtors had already paid the debt to the State, under a State Sequestration Act, and received from the State a discharge. Marshall, who represented the defendants, lost his case. His argument is fully reported, and is mainly devoted to an effort to show that the debt sued on was not a *bona fide* debt, subsisting in legal force, at the time of the Treaty.

His experiences in the Legislature of Virginia, not only extended his acquaintance among public men, but made him an earnest advocate of everything which tended to strengthen the hands of the Central Government. Thus the fall of 1787 found him in full sympathy with the proposed Constitution. Long afterwards he said to Justice Story:²⁹

The questions which were perpetually recurring in the State Legislatures; and which brought annually into doubt principles which I thought most sacred; which proved that everything was afloat, and that we had no safe anchorage ground; gave a high value in my estimation to that article in the Constitution which imposes restrictions on the States. I was consequently a determined advocate for its adoption; and became a candidate for the convention.

²⁹ Story's Discourse, Dillon's Marshall, vol. III, 345.

There was strong opposition to his election as the majority of people of Richmond were opposed to the new Constitution, but his personal popularity caused him to be chosen by a "triumphant majority." The Convention held its session in Richmond from the 2d to the 26th of June, 1788. There were one hundred and sixty-eight members. These were nearly equally divided in sentiment, and ratification was carried by only ten votes, and was accompanied by a resolution recommending twenty amendments to be proposed to the first Congress elected under the Constitution. It is said, so great was the public interest, that "industry deserted its pursuits, and even dissipation gave up its objects, for the superior enjoyments which were presented by the hall of the convention." The leaders of the opposition to the Constitution were Patrick Henry, George Mason, and William Grayton, while its principal advocates were James Madison, Governor Randolph, George Nicholas, and John Marshall. The last spoke twice at length. In his first argument he dealt with the power of Congress to lay direct taxes, and in the second with the provisions of the 3d Article dealing with the Federal Judiciary and Jurisdiction.⁸⁰ We cannot read the third volume of Elliot's Debates, in which the arguments of the Convention are re-

⁸⁰ He also made a few remarks in reply to criticisms of the power conferred on Congress to provide for calling forth the militia to execute the laws of the Union, suppress insurrection and repel invasions. This short speech will be found in Elliot's Debates, vol. III, 420, the longer arguments, *ibid.* 222-236, and 551-562.

corded, without perceiving that the main brunt of the defense of the new Constitution fell on the low-voiced Madison. No one would claim that the "tall young man," from Henrico County, "slovenly dressed in loose summer apparel," and not yet thirty-three years old, was the most influential member. Nevertheless, his popularity is attested by the fact that he was made a member of all the committees appointed by the Convention.³¹ His speeches are superior to those of every other member except Madison, and no one of the many speeches of the latter, equals either of Marshall's longer addresses in closeness of reasoning, and in clearness and virility of expression.

The Virginia Convention and his great success as a lawyer brought Marshall prominently before the public. In 1789 he declined the position of United States District Attorney at Richmond; his commission bearing the same date as that of Chief-Justice Jay. In 1795 Washington offered him the Attorney-Generalship, and in 1796, after the retirement of Monroe, the position of Minister to France. Both offers were declined because his situation at the Bar appeared to him "to be more independent, and not less honorable, than any other," and his "preference for it was decided."³² In his stead, Charles Cotesworth Pinckney was appointed Minister to

³¹ On Privileges and Elections, Elliot's Debates, vol. III, 1; on Form of Ratification, *ibid.* 655, 656; and on Amendments, *ibid.* 656.

³² Story's Discourse, Dillon's Marshall, vol. III, 355.

France. Our relations with that country, at this time, were far from satisfactory, France being greatly incensed because we had refused to aid her in her war with England and had even emphasized our neutrality by negotiating a Treaty with that country. The French Directory, not only refused to receive Pinckney, but ordered him to leave the country. He retired to Amsterdam to await instructions. In the meantime Adams had succeeded to the Presidency. The new President determined to send to France an extraordinary commission, and persuaded Marshall to become one of the three Commissioners. Marshall's associates were Pinckney and Elbridge Gerry. The Commissioners arrived in Paris on October 4th, 1797, Marshall having sailed from Philadelphia for Amsterdam on the 17th of the previous July.

The events of the next few months form an extraordinary episode in the diplomatic history of the time. Marshall conducted the American side of the correspondence with great skill and dignity; besides keeping an official journal which has preserved for the student many of the facts of this extraordinary burlesque on diplomatic negotiations. In view of the conditions in France, it is probable that the mission was from the beginning destined to failure. The Treaty of Peace between France and Austria, which was signed on October 27th, and which made France more independent of the good will of the young Republic, ended all possibility of a suc-

cessful issue. This fact finally became clear to Marshall and Pinckney. Gerry, whom the skill of Talleyrand had somewhat detached from his colleagues, determined to remain. His two associates, however, demanded their passports. These, after insulting delays, were finally sent to them, and Marshall arrived in New York on June 17th, 1798. The treatment which the envoys had received had created great indignation in the United States. The course followed by Marshall and Pinckney received general approval, and the former's enthusiastic reception in Philadelphia, of which Jefferson has left us a description in a letter to Madison, must have been some compensation to him for the failure of the mission.³³

M. was received here with the utmost eclat. The Secretary of State & many carriages, with all the cavalry, went to Frankford to meet him, and on his arrival here in the evening, the bells rung till late in the night, & immense crowds were collected to see & make part of the shew, which was circuitously paraded through the streets before he was set down at the city tavern.

Marshall had been gone nearly a year. His trying experiences had little bearing on his life work, and in this sense it was a year lost. Yet, from another point of view, the French Mission is an important event in his life. It greatly increased his

³³ Writings of Thomas Jefferson, vol. VII, 272. Letter of June 21st, 1798.

For an excellent short account of the mission to France, see Flanders' Marshall, chapter VIII.

reputation, and still further enhanced his popularity. For the first time he played a part on a national stage.

Returning to Richmond he again took his place as the leader of the Bar of Virginia.³⁴ But the movement of political events prevented his carrying out his wish to remain undisturbed in the practice of his profession. To the alarm of Washington, the Federal party was fast losing ground in Virginia and elsewhere. As has been intimated, Marshall's year in France had done something more than give him an insight into the character of that master of intrigue, M. Talleyrand,—it had made him by far the most popular Federalist in Virginia,—perhaps in the United States. He was the only man whom it was possible for the Federalists in the Richmond district to elect to Congress. In the early fall of 1798, he visited Washington at Mt. Vernon, and while there, yielding to the very earnest entreaties of his host, decided to become at the next election a candidate for Congress. It is not improbable that this determination, rather than his desire to remain at the Bar, led him to decline the position of Associate-Justice of the Supreme Court, which, on

³⁴ His name appears as counsel in the two Virginia cases reported, in which the names of counsel are given, between his return and December 17th, 1799, when he took his seat in Congress. These cases are: *Hooe vs. Marquess*, 4 Call's Reports, 416 (1798), 419; *Chapman vs. Chapman*, *ibid.* 430 (1799), 436. In October 1800, he argued the case of *Mayo vs. Bentley*, *ibid.* 528, 534. This is the last case in which his name appears as counsel prior to his nomination as chief-justice.

the death of Iredell, was offered to him by President Adams. The election did not take place until April, 1799. Party feeling ran high, and the contest was a long and bitter one. His election seems to have been due solely to a combination of three things; his great personal popularity; the fact that he was supported by Patrick Henry; and his opposition to the alien and sedition laws. His majority, as Washington said, though not as large as he could have wished, was nevertheless sufficient.

While men like Washington rejoiced at his election, the Federalists of New England were inclined to doubt the soundness, from their point of view, of his political opinions. These fears were not without foundation. His vote to repeal the alien and sedition laws, which was doubtless sincere, shows that he was not in complete sympathy with the extreme wing of that unorganized group which we know as the Federal Party. Yet we cannot read without a smile the following description of him as a new member of the House, given by Wolcott, in a letter to Fisher Ames: ³⁵

He is doubtless a man of virtue and distinguished talents, but he will think much of the State of Virginia, and is too much disposed to govern the world according to rules of logic; he will read and expound the constitution as if it were a penal statute, and will sometimes be embarrassed with doubts of which his friends will not perceive the importance.

³⁵ *Memoirs of the Administrations of Washington and John Adams*, G. Gibbs, vol. II, 314.

His position among his party from the first was one of influence. It was he who, on the 18th of December, informed the House of the death of Washington and moved the adjournment. The next day he presented the resolutions written by General Lee, on the death of the first President. His speech on this occasion is short and his words are well chosen; perhaps the best sentence being that which we have already quoted.

His services in Congress gave him an opportunity to deliver one speech of great importance, the substance of which has come down to us. Had his public career ended at this time, this speech, in spite of his position at the Bar and his well earned reputation as a public man, would have been his only, though yet sufficient, title to enduring remembrance by students of our public law. It is also not unlikely that it was the final cause which led President Adams to appoint him to the chief-justiceship.

The occasion was the surrender of Thomas Nash, alias Jonathan Robbins, to the British authorities by the President under the 21st Article of the Jay Treaty. This article provided:

It is further agreed that his Majesty and the United States, on mutual requisitions, by them respectively or by their respective ministers or officers authorized to make the same, will deliver up to justice all persons, who being charged with murder or forgery, committed within the jurisdiction of *either*, shall seek an asylum within any of the countries of *the other*: provided that this shall only be done on such evidence of criminality as, according to the laws of the place where the fugitive or persons so charged shall

be found, would justify his apprehension and commitment for trial, if the offense had there been committed.

In 1791, Robbins or Nash, an Irishman, was boatswain's mate of the British Frigate "Hermione." With others of the crew he mutinied, and killing the principal officers, carried the boat into the Spanish port of Laguayra. He was apprehended in Charleston, South Carolina, at the suggestion of the British Consul, in February, 1799. The British authorities applied first to the local Federal authorities and then to the President for his extradition. The President suggested in a letter to Judge Bee, the United States Judge in Charleston, that the Judge should deliver up the prisoner as requested if he thought that the clause in the Treaty regarding the evidence of criminality was satisfied. Judge Bee adopted the President's suggestion or request; had the prisoner brought before him on a writ of habeas corpus, and finding sufficient evidence to have warranted his detention for trial had the alleged crime been committed in this country, ordered him to be delivered to the Lieutenant of the British sloop "Sprightly," then in Charleston Harbor. In this proceeding the Judge did not exercise a judicial function. He merely, at the request of the President, acted as a commissioner to investigate certain facts which had been called to the President's attention. In handing the prisoner over to the British authorities, the judge had acted as an executive officer, carrying out the orders of the President. The British sloop sailed

away with Nash, and not long afterwards the British Admiral informed his government that the prisoner had been tried by court martial, convicted, and hung.

The affair created great excitement. Nash had claimed to be an American citizen, and the Republicans took the position that the President had illegally handed over a citizen of the United States to be tried and executed by a British court martial. Edward Livingston of New York introduced into the House a series of resolutions condemning the President's action. The resolution declared, that whether the alleged crime was committed within the exclusive jurisdiction of Great Britain, whether it came within the purview of the Treaty; and whether Nash, being unlawfully restrained on a British ship, had committed the alleged homicide in an attempt to gain his liberty, were all questions for judicial inquiry, and that the trial of the facts should have been by jury, as provided in the Constitution. It was in opposition to these resolutions that Marshall addressed the House on March 4th. His first proposition was that the case as stated to the President was within the 27th Article of the Treaty. This was a proposition not difficult to support. His second proposition, however, "that the case was a case for executive, not judicial decision," called forth all his great powers of illustration and argument. The speech is one of the best in our public annals. There are parts of it which in analysis, in the use of clear, concise,

English, equal any of his great judicial utterances. The following extracts show the main line of his argument, and are given, not only for this reason, but because they are typical of Marshall's style.³⁶

In this part of the argument, the gentleman from New York has presented a dilemma — of a very wonderful structure indeed. He says, that the offense of Thomas Nash was either a crime or not a crime. If it was a crime, the constitutional mode of punishment ought to have been observed; if it was not a crime, he ought not have been delivered up to a foreign government, where his punishment was inevitable.

It had escaped the observation of that gentleman, that if the murder by Thomas Nash was a crime, yet it was not a crime provided for by the Constitution, or triable in the courts of the United States; and that if it was not a crime, yet it is the precise case in which his surrender was stipulated by treaty. Of this extraordinary dilemma, then the gentleman from New York is, himself, perfectly at liberty to retain either form.

* * *

The gentleman from Pennsylvania, and the gentleman from Virginia, have both contended that this was a case proper for the decision of the courts, because points of law occurred, and points of law must have been decided in its determination.

The points of law which must have been decided, are stated by the gentleman from Pennsylvania to be, first, a question whether the offense was committed within the British jurisdiction; and secondly, whether the crime charged was comprehended within the Treaty.

It is true, sir, these points of law must have occurred, and must

³⁶ Marshall's Speech, as well as Judge Bee's Decision, Livingston's Resolution, and all other matter of interest bearing on the legal aspects of the case, will be found in Wharton's *State Trials of the United States*, p. 392, under the title, *Proceedings in the Case of Jonathan Robbins*.

have been decided: but it by no means follows that they could only have been decided in court. A variety of legal questions must present themselves in the performance of every part of executive duty, but these questions are not therefore to be decided in court. Whether a patent for land shall issue or not is always a question of law, but not a question which must necessarily be carried into court. The gentleman from Pennsylvania seems to have permitted himself to have been misled by the misrepresentation of the Constitution made in the resolutions of the gentleman from New York; and, in consequence of being so misled, his observations have the appearance of endeavoring to fit the Constitution to his arguments, instead of adapting his arguments to the Constitution.

When the gentleman has proved that these are questions of law, and that they must have been decided by the President, he has not advanced a single step towards proving that they were improper for an executive decision.

* * *

If a murder should be committed within the United States, and the murderer should seek an asylum in Britain, the question whether the *casus fœderis* of the twenty-seventh article had occurred, so that his delivery ought to be demanded, would be a question of law, but no man would say it was a question which ought to be decided in the courts.

* * *

The case was in its nature a national demand made upon the nation. The parties were the two nations. They cannot come into court to litigate their claims, nor can a court decide on them. Of consequence the demand is not a case for judicial cognizance.

The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations. Of consequence, the demand of a foreign nation can only be made on him.

* * *

He is charged to execute the laws. A treaty is declared to be

a law. He must then execute a treaty, where he, and he alone, possesses the means of executing it.

The treaty, which is a law, enjoins the performance of a particular object. The person, who is to perform this object, is marked out by the Constitution, since the person is named who conducts the foreign intercourse, and is to take care that the laws be faithfully executed. The means by which it is to be performed, the force of the nation, are in the hands of this person. Ought not this person to perform the object, although the particular mode of using the means has not been prescribed? Congress, unquestionably, may prescribe the mode, and Congress may devolve on others the whole execution of the contract; but, till this be done, it seems the duty of the executive department to execute the contract by any means it possesses.

The argument of Marshall terminated the discussion; the resolutions condemning the President were lost by a decided majority, and the principles set forth in Marshall's second proposition, have ever since formed the basis of executive action in similar cases.

Congress adjourned on the 14th of May. On the 17th of June, Marshall, without his knowledge, was appointed Secretary of War. This position he declined, but accepted the position of Secretary of State, to which he was appointed on the 13th of the same month; a position he continued to hold until March 4th, 1801, a month after he became Chief-Justice.

Marshall's commission as Chief-Justice is dated January 31st, 1801. He presided at the term which began on the 4th of February. This February term

was the first held in the new Capitol. Washington was a very different place in this the first year of its official existence, than the beautiful city we know to-day. Major L'Enfant, the French engineer, had indeed laid out our Capital on its present plan. The broad avenues, the magnificent distances, were all there—on the maps,—and there were the surveyors' stakes. For the rest, the site of the city was covered on the higher ground with scrub oak,—the lower ground was a bush-covered marsh. The few roads or ruts were axle-deep in yellow mud. Pennsylvania Avenue, connecting then as now the Capitol with the White House, or "Palace in the Wilderness," "was a deep morass covered with elder bushes." Only one wing of the Capitol had been erected. The private buildings were a few scattered wooden houses and huts, with two more pretentious houses on New Jersey Avenue. In short, the new Capitol, like the national government, had little substantial evidence of a brilliant future. Everything was new, the Capital City, the dual system of government, Federal and State, and the democracy just coming to power, shouting and hallooing with the joy of victory over the old social forces; all new, raw, untried, much of the governmental machinery and political material apparently as unlovely and unsuited for the serious work ahead, as this so-called city, dumped down on the mud banks of the Potomac, was as a dwelling place for the members of Congress, and the force of fifty-odd secretaries and clerks who, with

the President, made up the Executive arm of the government.³⁷

The advent of a new chief-justice could not have seemed an event of much importance even to the more thoughtful portion of the nation. The Republican was absorbed in the triumph of his party, and the Federalist, as he looked forward with foreboding to the future, did not dream that in this judicial appointment, President Adams had performed an act of more importance to the preservation of the nation than any other single act of his own or his predecessor's administration. For weak as all the departments of the Federal Government were, Congress had, in the twelve years of the nation's existence, accomplished much. The finances had been organized, important treaties had been negotiated; by firmness and statesmanship two serious wars had been averted. Only the judicial arm of the government had completely failed, apparently, to realize the hopes of those who had striven for the Constitution of 1787. Especially was this true of the Supreme Court, the head and center of the Federal Judicial system. The Court had been organized for eleven years. We can now see that these years, as a whole, were fruitful in the establishment of principles of really great importance. The Court had

³⁷ The formal transfer of the government from Philadelphia took place in October, 1800. The condition of the "City" at that time is graphically described in a letter written by General Cotton Smith, then a member of Congress from Connecticut. This letter is reprinted in *Souvenir of the American Capital*, by Joseph West Moore, p. 36.

spoken on constitutional questions, and the tone of the reported opinions had been in pleasing contrast with the uncertain accent of the Courts established under the earlier confederacy. The independence of the Judiciary from the Executive had been insured by the refusal of the members of the Court to answer legal questions propounded by the President. Nevertheless, the Court appeared to those whose hearts were bound up in the success of the new national government, to have fallen far short of their expectations. On its organization, Jay had accepted the chief-justiceship out of several offices offered to him, which is the best possible proof that he agreed with Washington that he was accepting the "head of that Department which must be considered as the key-stone of our political fabric." Yet in his letter to Adams, written December 19th, 1800, after the Senate had confirmed his re-appointment to the Chief-Justiceship, in declining the office, he says:³⁸

I left the bench perfectly convinced that under a system so defective it would not obtain the energy, weight, and dignity which are essential to its affording due support to the national government, nor acquire the public confidence and respect which, as a last resort of the justice of the nation, it should possess.

It may also be admitted that had we been present in Washington during the winter of 1801, Marshall's personal appearance would have hardly fitted in with what might well have been our preconceived

³⁸ Jay's Correspondence and Public Papers, vol. II, 285, 286; also the essay by James Brown Scott, Esq., *supra*, vol. I, 299.

notions of a good judicial presence. He was forty-five years old. To the casual observer negligence was undoubtedly the dominant note in his personality.³⁹ He gave the impression of being incapable of vigorous physical exercise, an illusion which the slight hesitancy in his speech probably tended to increase. He was six feet tall, loose jointed, swarthy, full featured; the first two characteristics giving to his plain dress an air of slovenliness which the real facts did not justify.⁴⁰ His head was small in proportion to his size; his black hair, tied in a cue behind, grew well down over his forehead, making it appear low, though in reality high and well formed.⁴¹ A smile of great sweetness was a faithful index to his disposition; but the only really striking personal feature was the eyes. Everyone who saw him and attempted to describe him, spoke of them. They were dark brown, so dark that many thought

³⁹ See description of William Wirt, written in 1804, *British Spy*, p. 295, 6 ed. 1817.

⁴⁰ "My grandmother, his daughter-in-law, once said to me: 'The descriptions of his dress are greatly exaggerated; he was regardless of style and fashions, but all those who knew him best and saw him daily testify to the extreme neatness of his attire.'" Mrs. Hardy, in *Green Bag*, vol. VIII, 484. There is evidence, however, that at least on one occasion, when travelling alone, he neglected to fasten his knee buckles. See an anecdote first published in the *Winchester Republican*, printed in *Howe's Virginia Historical Collections*, p. 275. Compare letter of Story to P. P. Fay, written February 25, 1808, just after first seeing him, when Story came to Washington to argue *Fletcher vs. Peck*: *Story's Life and Letters*, vol. I, 166.

⁴¹ The late Mr. Justice Gray pointed out that the busts of Frazee and Powers both show that his "head was high and well shaped." *Dillon's Marshall*, vol. I, 91.

them black;⁴² not large, but wonderfully expressive; possessing to use the old time language of Wirt, "an irradiating spirit," which proclaimed "the imperial powers of the mind," that sat, "enthroned within."

Marshall's advent as Chief-Justice is marked by a significant change. Since the organization of the Court, following the prevailing English custom, the Judges had pronounced their opinions *seriatim*. Beginning with the December term, 1801, the Chief-Justice became practically the sole mouth-piece. For eleven years the opinions are almost exclusively his opinions, and there are very few recorded dissents. The change was admirably adapted to strengthen the power and dignity of the Court. It became a distinct entity in the minds of men; not a mere collection of learned persons who one after another gave publicly the reason for their votes in counsel. The Chief-Justice embodied the majesty of the Judicial Department of the Government almost as fully as the President stood for the power of the Executive. That the change was deliberately adopted to strengthen the Court, not to glorify Marshall, is evident from what we know of his character. That it was acquiesced in by his associates without diminishing their good will towards their new chief, is most striking testimony to the persuasive force of

⁴² Wirt calls them black; but see Thayer's Marshall, p. 8, note 1, and the description of Marshall at the age of eighteen, given by a kinsman of Marshall and preserved in Binney's Eulogy, Dillon's Marshall, vol. III, 286.

his personality. For his associates were not men of mediocre ability. Cushing, the Senior Associate, had been a member of the Court since its inception, and had himself declined the chief-justiceship; William Paterson had been a leading member of the Federal Constitutional Convention, and a member of the Court since 1793; Chase, whatever his defects of judgment and temper, was a man of strong will, not easily led; Washington, the one member younger than Marshall, afterwards proved himself to be a man of learning and legal efficiency; Moore, though we know nothing of him as a judge, prior to his appointment was a distinguished advocate.

After the advent of Story, the practice of having the Chief-Justice always deliver the opinion of the Court was abandoned. Marshall, however, still delivered the opinion in the great majority of really important cases, and in practically all cases of any importance involving the interpretation of the Constitution. Thus, though at first he had five associates, and after 1807, six, he was the "Court" in perhaps a greater degree than any other judge of an appellate tribunal. His associates during the whole course of his judicial life were, as a rule, men of learning and ability. During most of the time the majority were the appointees of Democratic presidents, and supposed to be, before their elevation to the Bench, out of sympathy with the Federalistic ideas of the Chief-Justice. Yet in matters pertaining to constitutional construction, they seem to have

had hardly any other function than to add the weight of their silent concurrence to the decisions of their great chief. Thus, the task of expounding the Constitution was his task. For this work his prior preparation had been ideal. His outdoor life and simple habits had given him good health, that prime requisite of sustained mental effort. To construe the Constitution did not require great learning in the law; but it did require concentrated thought by a mind of analytical power. His training as a lawyer, evidently much greater than is usually supposed, was sufficient to develop his extraordinary analytical faculty; while his experience as a public man, and his consequent interest in public questions, made him properly estimate the importance of constitutional cases, and caused him to become completely absorbed in their solution. And, indeed, the constitutional questions which he had to meet in the course of his long judicial career were worthy the best efforts of a master mind. It was given to him, as it has been given to no other, to preside over the Supreme Court when it was called upon to decide four cases of vital importance: *Marbury vs. Madison*, *McCulloch vs. Maryland*, *Cohens vs. Virginia*, and *Gibbons vs. Ogden*. In each of these cases it is Marshall who writes the opinion of the Court; in each the continued existence of our peculiar Federal system depended on the action of the Court, and in each the Court adopted a principle which we now perceive was essential to our preservation as a Federal State.

The facts of the first of these cases, *Marbury vs. Madison*,⁴³ which was decided in 1803, are of dramatic interest. The Presidential contest of the fall of 1800 was one of extraordinary bitterness. On December 12th it was known in Washington that the Federalists had been defeated, and that Adams would not succeed himself. With the sure prospect of losing control of both the Executive and Legislative branches of the government after the ensuing 4th of March, the Federalists proceeded to entrench themselves in the Judicial Department. On February 13th, Marshall being Chief-Justice and Secretary of State, Congress passed an Act completely reorganizing the Federal Judiciary, and placing at Adams's disposal the appointment of a number of new Federal judges. On the 27th of February another Act was passed giving the President power to appoint any number of persons he saw fit to be Justices of the Peace in the District of Columbia. Almost to the last hour of his tenure of office, the outgoing President was busy filling the new judicial offices created by these acts. On the 4th of March the work was almost done. All the new judges had been commissioned; twelve persons had been appointed and confirmed as Justices of the Peace for the District; their commissions, duly signed by the President and attested by his Secretary, were in the office of the latter; but they had not been delivered. On the report of some disturbance in Alexandria, the

⁴³ 1 Cranch's Reports, 137 (1803).

twelve commissions were given to one James Marshall to deliver to the respective appointees, and had he been able to carry twelve commissions at one time a great constitutional question would have been left to be decided by another case. He found, however, that he could carry only eight, and therefore left four in the office. These four commissions were found when Madison, as Jefferson's Secretary of State, took possession. Jefferson believed that the title to an office is not complete until the delivery of the commission to the appointee, and that, as President, he had a right to cancel the appointment of those whose commissions had been found in the office of the Secretary.

At the December Term, 1801, Charles Lee, Adams's late Attorney-General, as counsel for Marbury and the three other persons who had been denied their commissions, moved the Supreme Court for a rule on the Secretary of State, to show cause why a mandamus should not issue to compel the Secretary to deliver the commissions. This motion was made under the Judiciary Act of 1789, which provided that the Supreme Court should have power "to issue writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed or persons holding office, under the authority of the United States." The motion was pending when the Court adjourned.

This December meeting of the Court had been held under the provision of the Act of the 13th of

February, which changed the terms of the Supreme Court from February and August to December and June. When the Court adjourned, therefore, they adjourned to meet in the following June. But the Congress which assembled on December 7th, 1801, was controlled by the Republicans, and that party was determined to undo the work which the Federalists had apparently accomplished in the last hours of their tenure of power. Congress could not, under the Constitution, remove the newly appointed judges; but they could and did, by repealing the Act of the 13th of February, deprive the new judges of all jurisdiction. Furthermore, the repealing Act restored the old terms of the Supreme Court, and therefore postponed the meeting of the Court from June to August. Not content with this, on the 13th of April, 1802, an Act was passed abolishing the August Term. The Supreme Court, therefore, found itself unceremoniously adjourned from December, 1801, to February, 1803. It is not unlikely that the pending motion in the case of *Marbury vs. Madison* had a good deal to do with the passage of the last mentioned Act.

If the legislation of the defeated Federalists in their last minutes of power was well calculated to anger the victorious Jeffersonians, the repeal of the Act of February 13th was equally adapted to arouse the wrath of those who, like Marshall, had been connected with the appointment of the repudiated judges; while as Chief-Justice he must have looked

upon the arbitrary adjournment of his Court for more than a year as a direct insult. But the calm tone of his opinion in this, his first great case, gives us no hint of the bitter party strife, with which he had been so closely identified, and out of which the case arose.

The case involved the right of Marbury to his commission as Justice of the Peace; and, admitting that right, the jurisdiction of the Court to issue the writ applied for. Granted the right of Marbury to his office, while the propriety of issuing an order to the Secretary of State might be questioned, the jurisdiction of the Court to issue the writ was apparently clear. There was the Act of Congress to which we have referred expressly conferring the jurisdiction on the Court. Though Marbury's attorney, Lee, had first dealt in his argument with the question of jurisdiction, as Marshall began to read his opinion, his auditors were doubtless not surprised to hear him turn at once to the question: "Has the applicant the right to the commission he demands?" As they listened, according to their political affiliations, they must have rejoiced or raged as the Chief-Justice, step by step, with inexorable logic, demonstrated that Jefferson, in withholding the commission, had acted without warrant of law, and violated a vested legal right. Turning from the question of substantive law, Marshall showed in a few paragraphs that the delivery of the commission is a mere ministerial act which a Court can order the officer to perform;

that the writ of mandamus is the proper writ in such a case; that the Act of Congress expressly authorizes the Supreme Court to issue a writ of mandamus to a person holding office under the United States in a case warranted by the principles of law. Most of his auditors must have thought as he reached this last conclusion that he was about to direct that the mandamus prayed for should issue. But the judge had not reached the end of his opinion.⁴⁴

The secretary of state, being a person holding an office under the authority of the United States, is precisely within the letter of the description; and if this court is not authorized to issue a writ of mandamus to such an officer, it must be because the law is unconstitutional, and therefore absolutely incapable of conferring the authority, and assigning the duties which its words purport to confer and assign.

By an analysis of the 3d Article of the Constitution he showed, that while the Constitution leaves to Congress the duty of organizing the Supreme Court and designating those cases in which the Court shall have appellate jurisdiction, it prohibits Congress from conferring original jurisdiction on the Court; the cases in which the Court can have original jurisdiction being only those mentioned in the second section of the 3d Article; namely, "cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be a party. . . ." It was clear that the Court, should it issue the writ asked for, would be exercising an original,

⁴⁴ 1 Cranch's Reports, p. 173.

not an appellate jurisdiction. Thus the Act which directed the Court to issue the writ in a case like the one before it, and the Constitution which prevented the Court from exercising an original jurisdiction except in the enumerated cases, were in direct conflict with each other. For the first time in its history the Court was face to face with the momentous question, whether an act of Congress contrary to the Constitution was or was not binding on the Judiciary.

That Marshall realized the importance of the question before him is evident. In the first paragraph of this part of his opinion he says: ⁴⁵

The question, whether an act, repugnant to the constitution, can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest.

The opinion which follows is not so much an argument as a statement of fundamental political principles on which his audience, the people of the United States, Federalists and Republicans, were agreed. The colonial governments were created by written instruments or charters. These charters had been regarded by the colonists as contracts between themselves and the King. In nearly every instance they created legislatures whose powers were limited by the charters. All acts contrary to the laws of England were void. Thus, the idea of a government

⁴⁵ 1 Cranch's Reports, p. 176.

created by written instrument, having only those powers which were granted in the instrument, was familiar to Marshall's audience. It was the outgrowth of pre-revolutionary conditions. The Revolution had introduced into political thought a wholly distinct idea; namely, that the people were the source of all government and law. With consummate skill Marshall blends the two ideas into a single proposition when he says: ⁴⁶

That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis, on which the whole American fabric has been erected.

Note that the people not only have a right to establish a government but principles for the future guidance of that government. He continues:

The principles, therefore, so established, are deemed fundamental. And as the authority, from which they proceed, is supreme, and can seldom act, they are designed to be permanent.

This original and supreme will organizes the government, and assigns, to different departments, their respective powers. It may either stop here; or establish certain limits not to be transcended by those departments.

The government of the United States is of the latter description.

Having in this succinct manner stated the supremacy of the people as the source of government, and declared their ability to create a government in which any or all of the departments, including the

⁴⁶ 1 Cranch's Reports, p. 176.

legislative, should exercise only limited functions, the conclusion that a legislative act transgressing the limits of the Constitution is not law, and therefore must be disregarded by the Judiciary, whose province it is to say what law is, is inevitable. Admitting the premises, no other conclusion may be reached by the human mind.

It is not difficult to see the supreme importance of the case. As we have pointed out, it is essential to the preservation of our peculiar dual system of government that the people should recognize some one body as the final arbiter of constitutional questions. The only body in our system which had a chance of securing the necessary confidence and respect for its interpretation of the Constitution, was the Supreme Court, and in *Marbury vs. Madison*, Marshall announced that it was the duty of the Court to decide all alleged conflicts between Federal and State legislation and the Constitution.

The Supreme Court, however, is a Court; nothing more. The judges do not form a body of referees. Congress, the President, or a State Legislature cannot refer a proposed act to the Court in order to ascertain if, when passed, it will be constitutional. The conformity of the act to the Constitution will be passed on by the Court only if a decision is necessary in order to determine the rights of parties engaged in litigation before it. In order, therefore, that the full value of the decision in *Marbury vs. Madison* should be realized, it is necessary that there

should be a right of appeal to the Supreme Court in every civil and criminal case involving a question of constitutional construction. If the State courts had the power to determine finally, in all cases coming before them, the constitutionality of the acts of their own legislatures, or of Congress, there would be as many interpretations of the Constitution as there are states; besides which an Act of a State Legislature which had been upheld by the courts of the State, might in another case be declared unconstitutional by the Supreme Court; while an Act of Congress, upheld by the Supreme Court, might be declared unconstitutional by a state court. The resulting confusion would be unbearable. Yet, the assertion that it was impossible for Congress to confer on the Supreme Court jurisdiction in an important class of constitutional cases, was the claim made by one of the states thirty-two years after the organization of the Supreme Court, in the case of *Cohens vs. Virginia*.⁴⁷

In order to understand this case it must be remembered, that while the Constitution declares that the Judicial power of the United States shall extend "to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;" the creation and organization of the Federal Courts is left to Congressional action. By the 25th section of the Judiciary Act, passed at the first

⁴⁷ 6 Wheaton's Reports, 264 (1821).

session of the first Congress, it was provided that when a suit was brought in a State Court, if either of the parties claimed a right, title or privilege under the Constitution or laws of the United States, should the State Court decide that the right, title or privilege claimed did not exist, the defeated party had a right to appeal to the Supreme Court of the United States.⁴⁸ The right of Congress to provide that the appellate jurisdiction of the Supreme Court, in cases arising under the Constitution and laws of the United States, should be exercised in this way, while not questioned at the time, was denied by counsel in a case finally decided in 1816, the case of *Martin vs. Hunter's lessee*.⁴⁹ The ground taken by counsel in the Supreme Court in that case was, that while Congress could give to the Federal Courts original jurisdiction in all cases which involved the interpretation of the Constitution of the United States, they could not confer on the Supreme Court the right to entertain an appeal from a State Court. The point involved was of great practical importance, and not without difficulty; Story's opinion upholding the

⁴⁸ The 25th section of the Judiciary Act omits to provide for an appeal to the Supreme Court of the United States in cases where the state courts affirm the right, title or privilege claimed. To this extent Congress has not obeyed the mandate of the Constitution, and there are some cases, involving the construction of the Constitution of the United States, which cannot reach the Supreme Court. As the cases are all of that class in which the state courts have themselves upheld Federal power, or curtailed state power, the omission to provide for a final decision by the Supreme Court is not of great importance.

⁴⁹ 1 Wheaton's Reports, 304 (1816).

method of exercising the jurisdiction adopted by Congress, is justly regarded as one of the best written by that learned Justice.

In *Cohens vs. Virginia*, two persons named Cohen were indicted in the Quarterly Sessions Court of the borough of Norfolk, Virginia, on information for selling lottery tickets contrary to the Act of the Legislature of Virginia. The defendants claimed the protection of an Act of Congress relating to the District of Columbia. Judgment was given against them, and, as there was no appeal to a higher Virginia Court, they appealed directly to the Supreme Court of the United States. Counsel for the State moved to dismiss the appeal for want of jurisdiction.

It will be observed that there was only one difference between this case and *Martin vs. Hunter's lessee*,—a state was a party. The objection to the jurisdiction of the Supreme Court went deeper than that raised in the earlier case. In *Martin vs. Hunter's lessee* it was contended only that Congress had in no case the right to grant an appeal from a State Court to the Supreme Court; but it was not denied that Congress might have given original jurisdiction in a case like *Martin vs. Hunter's lessee* to the lower Federal Courts. The objection to the jurisdiction in *Cohens vs. Virginia* was that a sovereign state without its own consent could not become a party in any Federal Court, unless the party plaintiff was itself a state. Had Marshall held that this objection was well taken, Congress could not, as in *Martin vs.*

Hunter's lessee, have provided another method for the final determination by the Supreme Court of constitutional questions arising in prosecutions or suits brought by states against individuals. Had Virginia succeeded in her contention the Court would have ceased to be an arbiter, not only in those constitutional cases in which a state was a party, but in practically all constitutional cases; for a state could nullify any Act of Congress by merely passing a law making it a crime for any one to comply with its provisions. Those imprisoned under this criminal statute, the state being the party plaintiff in the prosecution, would have no redress. Thus *Cohens vs. Virginia* was a case of supreme importance. As in *Marbury vs. Madison*, the future of our Federal State, hung in the balance. A different decision in the earlier case would have left the States at the mercy of Congress' interpretation of its express powers; a different decision in this later case would have left the Federal Government at the mercy of the States' interpretation of their reserved powers.

Marshall's opinion in *McCulloch vs. Maryland*,⁵⁰ is perhaps the most celebrated Judicial utterance in the annals of the English speaking world. In 1816, Congress incorporated the Bank of the United States. A branch of this bank was established in Baltimore. In 1818 the legislature of Maryland passed a law taxing "all Banks, or branches thereof, in the State of Maryland, *not chartered by the legislature.*" The

⁵⁰ 4 Wheaton's Reports, 316 (1819).

Act provided that if any bank had or should establish any branch in the State without the authority of the Legislature, it should not be lawful for it to issue notes, except of certain denominations. Notes of the permitted denominations had to be printed on stamped paper furnished by the State, the tax for the stamps ranging from ten cents for a five dollar note to twenty dollars for a thousand dollar note. The legislation was the result of the popular agitation against the United States Bank, and was designed to prevent its doing business in the State. The Directors of the Bank claimed that the legislation was unconstitutional. McCulloch, the Cashier of the Baltimore branch, refused to pay the tax, and as a result of this refusal, was sued by an officer of the State under one of the provisions of the State Act. Judgment was given against the cashier in the state courts, and the case was appealed to the Supreme Court of the United States. There the decision of the Maryland Court of Appeals was unanimously reversed.

In this case two questions were before the Supreme Court. First: Has the United States a right to incorporate a bank? Second: If the United States has a right to incorporate a bank, was the Maryland Act as applied to the branch of the Bank of the United States situated in that State, unconstitutional?

The part of Marshall's opinion which is of supreme importance is that in which he deals with the first question. The reader may easily perceive that

the future of our Federal State would not be jeopardized if our national Government did not possess the right to incorporate a bank, and that, therefore, the continuance of the experiment inaugurated by the adoption of the Constitution did not depend on the way Marshall decided the case before him. But the stability of our peculiar dual system of national and local governments unquestionably did depend on the adoption by the Court in this case of certain principles by which to test the constitutionality of an Act of Congress said to exceed the limits of Federal power. The First Article of the Constitution, after creating the legislative body, Congress, declares that the Congress shall have certain powers. After enumerating these "powers," the Constitution further provides that Congress shall have power, "to make all laws which are necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof." In interpreting the extent of the powers of the Federal Government, those who believe in what is called the states' rights theory of constitutional interpretation, adhere to two principles: First: any Act of Congress which cannot be referred to some specific grant of power in the Constitution is unconstitutional; second: even though an Act is claimed to be passed by Congress under one of the powers expressly delegated, the burden is on those who would maintain the Act to show that it is

necessary to carry into execution the power. On the other hand, the extreme Federalist maintains, that, besides the enumerated powers, an Act of Congress may be justified by showing that the power to pass it necessarily inheres in a national government. Between these two extremes is the position, that while the United States is a government of delegated powers, and cannot exercise any power which is not expressly granted, Congress has, in the execution of its enumerated powers, a wide choice of means.

Marshall in *McCulloch vs. Maryland*, took the intermediate position. "This government," he declares, "is acknowledged by all to be one of enumerated powers."⁵¹ And later he says:⁵²

We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

Had Marshall adopted the view of the states' rights party, and confined Congress in its choice of means to those which must be selected if the power delegated is to be exercised at all, the weight of his

⁵¹ 4 Wheaton's Reports, p. 405.

⁵² 4 Wheaton's Reports, p. 421.

great name and position, added to the then state of public opinion, would have fastened upon us this canon of interpretation of the powers of the Federal Government. In his own words:⁵³

The baneful influence of this narrow construction on all the operations of the government, and the absolute impracticability of maintaining it without rendering the government incompetent to its great objects, might be illustrated by numerous examples drawn from the constitution, and from our laws.

Indeed, our Federal Government would have soon lost its vitality. Congress could propose legislation, but the veto power would be in the Court. Instead of its present wide discretion in the choice of means to execute the powers entrusted to it, only those means could be selected which the majority of the Supreme Court for the time being might think wise. The Court would be the real judge of the expediency of each legislative act. A law constitutional to-day because essential under existing conditions, would be unconstitutional to-morrow because those conditions had changed.

The case of *Gibbons vs. Ogden*,⁵⁴ decided in 1824, deals with the extent and nature of the Federal power over commerce. The Constitution confers on Congress the power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." As early as 1793, Congress passed an Act to license vessels desiring to engage

⁵³ 4 Wheaton's Reports, pp. 417, 418.

⁵⁴ 9 Wheaton's Reports, 1.

in the coasting trade. Subsequently, by special acts, the legislature of the State of New York granted to Robert R. Livingston and Robert Fulton, the exclusive right to navigate, with vessels propelled by steam, all waters within the jurisdiction of the State. The grantees assigned this franchise to John R. Livingston, who in turn assigned to Aaron Ogden the right to navigate the waters of the State in boats passing from New Jersey to New York. One Gibbons procured two vessels propelled by steam called the "Stoudlinger" and "Bellona;" had them registered under the Act of Congress referred to, and proceeded to run them between Elizabethtown, New Jersey, and New York City, in defiance of the exclusive privilege claimed by Ogden. Ogden applied to Chancellor Kent for a perpetual injunction. Gibbons asserted that the exclusive privilege granted by the State Legislature was contrary to the Constitution and laws of the United States. Kent, disregarding this defense, granted the injunction. His decree was affirmed by the highest court of the State, and Gibbons appealed to the Supreme Court of the United States, where the decision was reversed by a unanimous court, though Mr. Justice Johnson wrote a separate opinion.

The case involved several questions. Did the word "commerce" in the grant of power over that subject in the Constitution, include navigation? Admitting that it did, had the states, in the absence of Congressional legislation, a power to regulate for-

eign and interstate commerce? If the states retained a concurrent power over interstate commerce until Congress had acted, did the legislation of New York, as applied to boats licensed under the Act of Congress, conflict with that Act?

Though all these questions were interesting and important, only the first can be said to have been vital. The word "commerce," like most words in common use describing classes of acts or things, is used with different shades of meaning. When we speak of the commerce between two countries, if we use the word "commerce" in its broadest sense, we intend to include nearly all forms of intercourse between their respective inhabitants; whether that intercourse takes the form of the exchange of goods, letters or telegrams, or the passage of persons from one country to the other by trains or boats. The character of the transactions, whether, for instance, the boats come or go for the pleasure or profit of their owners, is immaterial. Again, we may use the word "commerce" intending thereby to indicate all intercourse between the citizens of the two countries undertaken for profit, thus including, not only the exchange of goods, but the act of carrying goods or passengers for hire between the two countries. Or we may mean to include all acts which relate to buying, selling, and transporting goods, but to exclude the idea of the transportation of passengers. Lastly, we may intend to designate the business of buying and selling, but not the business of transporting

either goods or passengers; as when we speak of "commerce and navigation," thus using the word "commerce" to distinguish the business of the merchant from the business of the carrier by water.

The counsel for Ogden contended that in construing the extent of the power granted to Congress, the word "commerce" should be so read as to exclude the idea of navigation. To have adopted this construction would have prevented Congress to-day regulating the interstate railways of the country, for if commerce does not include the business of the carrier by water, it does not include the business of the carrier by land. The desire to form a more perfect union, which led to the adoption of our Constitution, was due to two causes; the fear of foreign aggression, and the desire for economic unity. Had Congress no power to regulate the business of the common carrier, the Constitution would have failed to accomplish the second object; for experience has so far shown that the principal interstate and foreign commerce which needs regulation is the business of the carrier. As Marshall in the course of his opinion himself says: ⁵⁵

The mind can scarcely conceive a system for regulating commerce between nations, which shall exclude all laws concerning navigation, which shall be silent on the admission of the vessels of the one nation into the ports of the other, and be confined to prescribing rules for the conduct of individuals, in the actual employment of buying and selling, or of barter.

⁵⁵ 9 Wheaton's Reports, p. 190.

What is here said in respect to vessels could be said to-day with even greater force in regard to the great trunk-lines of the country.

But Marshall saw no reason to suppose that the Framers, when they conferred on Congress the power to regulate commerce, in order to accomplish one of the chief objects of the Constitution, intended to use the word in its narrowest possible signification. "Commerce," he says, "undoubtedly, is traffic, but it is something more; it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse."⁵⁶ It will thus be seen that while Marshall does not perhaps here give to the word commerce the broadest possible definition, he does give to it a definition broad enough to enable the Federal Government to control effectually the interstate and foreign business of the country; thus again taking a position vital to our preservation as a nation under the Constitution.

In the first two of the four cases, the facts of which we have detailed, he had not only affirmed that the Constitution was the supreme law, but that the Supreme Court was the final interpreter of the Constitution; in the third he had maintained the right of the Federal Legislature to an effective choice of means in the execution of the powers entrusted to it; and now, in this last case, he gave sufficient scope to

⁵⁶ 9 Wheaton's Reports, pp. 189, 190.

the Federal power over commerce to enable Congress to carry out one of the two great objects of our union. To the writer, for the reasons stated, these are the supremely important cases, not only of Marshall's day, but of our constitutional law. His work, however, as an expounder of the Constitution, was not confined, and is not to be measured, by these four cases alone. In all we have reported some forty-four decisions of his involving constitutional questions. Nearly every important part of our Constitution, as it existed prior to the 13th Amendment, is treated in one or more of these cases. After his death, his more important opinions were gathered into a volume appropriately entitled, "Marshall on the Federal Constitution." The Constitution as we know it in its most important aspects is the Constitution as he interpreted it. He did not work out with completeness the position of the states in our Federal system, but he did clearly grasp himself, and firmly establish, the position of the Federal Legislature and the Federal Judiciary. For our preservation as a nation it was first necessary that the position and powers of our Federal Government should be clearly defined and firmly maintained.

Had Marshall been merely a far seeing statesman and not a great judge, while most of his important cases would have been decided as he decided them, his life work would have been a failure. It was not only necessary that he should decide great constitutional questions properly, but also that our peo-

ple should accept the constitutional decisions of the Supreme Court as final. Though, as has been pointed out, we are accustomed to regard the Supreme Court as the final arbiter of all disputed questions of constitutional interpretation, Marshall's contemporaries often questioned the right of the Court to decide, finally, disputed questions of constitutional law. Had he issued the mandamus asked for in *Marbury vs. Madison*, Jefferson would have ordered Madison to disregard it. As it was *Marbury* never received his commission, though Marshall declared he was entitled to it. *Fletcher vs. Peck* is a leading case, establishing the important principle that a state cannot repudiate its own grant. To-day no state in the Union would dispute this principle; but the decision itself did not result in the subject matter of the grant involved in the case being given to those whom the Supreme Court declared were legally entitled to it. After the decision in *McCulloch vs. Maryland*, a committee of the Legislature of Ohio, in a report to the Legislature, derided the decision and the claim of the court to be the final arbiter in Constitutional questions, and the Legislature itself passed an Act withdrawing the protection of the laws of Ohio from the Bank of the United States. The decision in *Cohens vs. Virginia* raised a storm of protest.⁵⁷

⁵⁷ See on this phase of Marshall's decisions, the interesting notes of Mr. Joseph P. Cotton, Jr., to his "Constitutional Decisions of John Marshall."

In order to establish firmly the Supreme Court as the interpreter of the Constitution, it was necessary that its opinions in the more important of the early constitutional cases should carry, to those who studied them a conviction that the Constitution as written had been interpreted according to its evident meaning. Marshall's opinions fulfilled this prime requisite. It is true, the people as a whole read the opinions of the Supreme Court then perhaps as little as they read them to-day. But the lawyers read them, and as a class, though of course with exceptions, the profession was convinced that the Constitution had been correctly expounded. As a rule, the greater the issue involved in the decision, or the more important the principle to be enunciated, the more completely satisfying is the argument of the great judge. If we read his opinions in the four cases already discussed, while we may have some doubt in regard to several minor matters treated, we will indeed prove a rare exception to the general rule if we have any doubt in regard to the correctness of his conclusions on questions of first importance. Thus, in *Marbury vs. Madison*, we may doubt whether the appointment to a Federal office is complete until the appointee's commission is delivered to him, but not the duty of the judiciary to disregard unconstitutional legislation; in *McCulloch vs. Maryland* we may question the correctness of the assertion that "the power to tax is the power to destroy," but not the power of the Federal Government to create

a corporation as a means of executing one of its enumerated powers; in *Gibbons vs. Ogden*, we may think, in spite of Marshall's opinion to the contrary, that the legislation of Congress and of the State of New York were not in conflict, but we will not dispute the correctness of his definition of the scope of the Federal power over commerce; while in *Cohens vs. Virginia*, as the Court confines itself to the single question of jurisdiction, we will accept Marshall's argument in all its parts as sound. This ability to take a legal question on which a large number of persons have preconceived opinions, the product of their political prejudices, analyze it in all its parts in such a way that the conclusion reached is admitted by the great majority of each succeeding generation of students to be inevitable, is the best test of Marshall's greatness as a lawyer.

Indeed, if we study closely his principal opinions, we find that they contain all those elements which make a great legal argument. The chief characteristic of his arguments is their cumulative force. The ground for the premise is carefully prepared; the premise itself is clearly stated; nearly every possible objection is examined and answered; and then, with almost dramatic power, he confronts us with the inevitable conclusion. There is little or no repetition, but there is a wealth of illustration, a completeness of analysis, that convinces the reader, not only that the subject has been adequately treated, but that it has been exhausted. Story, after he had gone to

Washington to argue the case of *Fletcher vs. Peck*, wrote to a friend: ⁵⁸

His (Marshall's) genius is, in my opinion, vigorous and powerful, less rapid than discriminating, and less vivid than uniform in its light. He examines the intricacies of a subject with calm and persevering circumspection, and unravels the mysteries with irresistible acuteness.

His style, reflecting his character, suits perfectly the subject matter. Besides a strong moral sense, he had that rare combination of characteristics seen only in the greatest men; entirely without conceit, he nevertheless was absolutely self-confident. Simple in the best sense of the word, his intellectual processes were so clear, that he never doubted the correctness of the conclusions to which they led him. Placed in a position the great responsibility of which he clearly recognized, he seems to have turned to the difficult questions confronting him confident in his ability to reach a correct conclusion. To him it was not he who solved the problem. He merely dissected the question at issue; the inexorable rules of logic did the rest. Thus his opinions are simple, clear, dignified. Intensely interesting, the interest is in the argument, not in its expression. The imagination plays no part. There is an entire absence of metaphor and no attempt at the rhetorical; and yet, throughout, we feel an undercurrent of eloquence. He makes us see the vast interests which

⁵⁸ Letter to Samuel P. P. Fay, Esq., *Life and Letters of Joseph Story*, vol. I, 166, 167.

hang on the decision of the Court, and, unconsciously, the strength of his character and his intellectual force. We realize that this strong man, having calmly considered every possible phase of the question, has no doubt in regard to the correctness of his conclusion, and we catch the contagion of his earnestness. Few Americans can read without a quickening of the pulse that wonderful passage from his opinion in *Cohens vs. Virginia*, which begins: ⁵⁹

That the United States form, for many, and for most important purposes, a single nation, has not yet been denied. In war, we are one people. In making peace, we are one people. In all commercial regulations, we are one and the same people.

Again, Marshall had in a wonderful degree the power of phrase. He expressed important principles of law in language which tersely, yet clearly, conveyed his exact meaning. Not only do we interpret the Constitution largely as he taught us to interpret it, but, when we wish to express the important constitutional principles which he enunciated, we use his exact words. This is especially true of his more significant statements in regard to the extent of Federal power. Take, for instance, the following: "The government of the Union, though limited in its powers, is supreme within its sphere of action," or the more celebrated passage which we have quoted above, beginning, "Let the end be legitimate, let it be within the scope of the constitution,

⁵⁹ 6 Wheaton's Reports, p. 413.

etc." Scarcely less well known are the following quotations from his opinion in *Gibbons vs. Ogden*:⁶⁰

This power (to regulate commerce) like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution.

All experience shows, that the same measures, or measures scarcely distinguishable from each other, may flow from distinct powers; but this does not prove that the powers themselves are identical.

What is true of his statements of principle, is also true of a large number of his arguments. When we wish to re-state and explain them, we find, in most cases, that the shortest and clearest way is to quote the argument in its entirety just as he wrote it.

In addition to the qualities to which we have called attention, Marshall's opinions show that he adhered closely to the words of the Constitution; indeed, no one who has attempted to expound our fundamental law has confined himself more strictly to an examination of the text. In the proper, though not in the historical sense, Marshall was the strictest of strict constructionists; and as a necessary result his opinions are practically devoid of theories of government, sovereignty, and the rights of man. The only theory, if we may call it such, in which he ever indulged was that for which he had express warrant in the opening words of the Constitution; namely,

⁶⁰ 6 Wheaton's Reports, pp. 196, 204.

that that instrument was adopted by the people of the United States and not by the states. But while he uses this conception to show that implied limitations of Federal power, arising out of the assertion that the Constitution was adopted by the States, have nothing to support them, there is nothing to indicate, that had he believed that our Constitution was adopted by the States, this belief would have influenced any one of his decisions. *Marbury vs. Madison* is the only case in which this theory of the adoption of the Constitution is part of the argument on which his conclusion is based, and the opinion in that case, that it was the Court's duty to ignore an unconstitutional act of Congress, was satisfactory to the members of the state's rights party. The Constitution is the supreme law whether adopted by the sovereign states or the sovereign people.

We may or we may not agree with that method of expounding the Constitution which confines the investigation to the text, borrowing nothing from political theory; but we must acknowledge that this is the only method to adopt if we wish our judicial interpretation of the Constitution to be the same yesterday, to-day and to-morrow. If we are to limit or extend the power of the Federal government, the rights of the states or the rights of the citizens of the United States, not by the words of the Constitution, but by some theory of the nature of our government from which we evolve implied grants or limitations of power, then we must expect our consti-

tutional law to change, not only by amendments to the Constitution, but with the rise and fall of particular theories of the nature of our Federal State. Had Marshall's opinions consisted in learned disquisitions on the nature of sovereignty, he might have captivated the popular ear of his day, and so convinced many persons of the soundness of his decisions who were untouched by the careful analytical method which he adopted; but in that event, his opinions would not have outlived the particular theory on which they rested.

The advantage of the method of expounding the Constitution which confines itself to the text, is perhaps best seen in his opinion in *Cohen vs. Virginia*. In that case, Virginia contended that she, as a sovereign state, could not be made a party in a court of justice against her will. The contention was based on the nature of state sovereignty according to the then prevalent theory of the states' rights party. Those who objected to Marshall's decision were those who believed in this theory. Marshall demonstrated that the judicial power of the United States in a case like the case before him had been in express terms given to the United States Courts; and that a defendant in a criminal prosecution, taking an appeal from the judgment which convicted him of a crime, did not "prosecute" a suit against a state within the prohibition of the 11th Amendment. His opponents had to show an implied limitation on the plain words of the Constitution arising out of a conception of state sov-

ereignty not expressed in any part of the Constitution. Perhaps most of his contemporaries, as they believed in that theory, believed Marshall's decision to be erroneous. But time has passed; theories of state sovereignty have given place to the implied reserve rights of the citizens of the United States. The Constitution, however, yet remains, and Marshall's opinion, unaffected by the rise and fall of theories, stands to-day as a monument, not only of his genius, but of his method of constitutional interpretation,—that method which avoids theories, and examining the Constitution as written, abides by its plain meaning.

It is important to emphasize the fact that Marshall adhered in his opinions to the Constitution as written, not only because it is a fact which must be recognized if we are to understand the character and value of his work in the field of constitutional law, but also because there is to-day a popular impression to the effect that, by implication, he stretched to the utmost the powers of the Federal Government. This impression is due primarily to the ignorance of many of those who have undertaken to praise him. During his life, by the followers of Jefferson and Calhoun, he was charged with upholding Federal power in cases not warranted by the Constitution. This charge to one who had not read his opinions, and who heard his supporters and critics speak of his doctrine of "implied powers," had a certain superficial basis of truth. The so called strict con-

structionist could say that we should not imply anything, but confine ourselves to the letter of the Constitution. Later, however, those who admired a strong national government, without taking the trouble to ascertain whether the old criticism by members of the states' rights party was just, regarded the assumption on which it was founded as Marshall's best claim to our gratitude. Thus we often hear him spoken of as a statesman who decided important political questions in a way to preserve the union; or as the man who took our Constitution and molded it so that it has become an instrument fitted to be the fundamental law of a great nation. Yet his careful avoidance of all theory, and the fact that in his own mind at least he based all his opinions on the words of the Constitution, is evident to the most casual reader of his opinions. In the following passage from *Gibbons vs. Ogden*, he gives us his fundamental canon of constitutional interpretation:⁶¹

What do gentlemen mean by a strict construction? If they contend only against that enlarged construction, which would extend words beyond their natural and obvious import, we might question the application of the term, but should not controvert the principle. If they contend for that narrow construction which, in support of some theory not to be found in the constitution, would deny to the government those powers which the words of the grant, as usually understood, import, and which are consistent with the general views and objects of the instrument; for that narrow construction, which would cripple the government, and render it unequal to the objects for which it is declared to be

⁶¹ 9 Wheaton's Reports, pp. 188, 189.

instituted, and to which the powers given, as fairly understood, render it competent; then we cannot perceive the propriety of this strict construction, nor adopt it as the rule by which the constitution is to be expounded. As men, whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said. If, from the imperfection of human language, there should be serious doubts respecting the extent of any given power, it is a well settled rule, that the objects for which it was given, especially when those objects are expressed in the instrument itself, should have great influence in the construction.

This is merely applying to the interpretation of the Constitution, the rules universally accepted, for the interpretation of other written instruments, and there is not one of his constitutional opinions in which he did not conscientiously try to apply them. Where the words were plain he took them in their ordinary sense, neither adding nor detracting from their obvious meaning. Above all, as stated, he avoided changing the apparent meaning of the words used by theories of government or sovereignty. Take, for instance, the case of the *United States vs. Fisher*.⁶² The constitutional question involved was the power of Congress to give the United States a preference over all other creditors in the distribution of the assets of a bankrupt. To-day, if such a question should, for the first time, come before the

⁶² 2 Cranch's Reports, 358 (1804).

Supreme Court, we might with confidence predict that the Act would be upheld on the ground that all national governments have, necessarily, the right to give themselves such priority. Not so Marshall. To him the Act must be supported, if at all, not on any theory of the innate nature of government, national or otherwise, but as a reasonable means of carrying out one of the express powers conferred by the Constitution on the Federal Government. Thus he upholds the Act in question, not because it is a government which has given a preference to itself in the distribution of the assets of a bankrupt, but because of the power expressly conferred on the Federal Government to pay the debts of the union. He says: ⁶⁸

The government is to pay the debt of the union, and must be authorized to use the means which appear to itself most eligible to effect that object. It has consequently a right to make remittances by bills or otherwise, and to take those precautions which will render the transaction safe.

This strict avoidance of all theory is also illustrated in three other cases, in two of which the decisions hamper Federal Judicial power, while the third curtails the power of the states.

The Third Article of the Constitution provides:

The Judicial power shall extend * * * to controversies to which the United States shall be a party; to controversies between two or more States, between a State and citizens of another State, between citizens of different States, between citizens of the same

⁶⁸ 2 Cranch's Reports, p. 396.

State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens, or subjects.

In *Hepburn vs. Ellzey*,⁶⁴ Marshall held that the District of Columbia was not a state within the meaning of this clause of the Constitution and the Judiciary Act, and that therefore a citizen of the District could not sue a citizen of Virginia in the Circuit Court of the United States for the district of Virginia. In the later case of *New Orleans vs. Winter*,⁶⁵ the principle enunciated in *Hepburn vs. Ellzey* was applied to a citizen of the then territory of Mississippi; Marshall holding that the Federal jurisdiction as given in the Constitution did not extend to a suit between such a citizen and a citizen of one of the states. He admitted that the word "state" as used by writers on political science might well be held to include an organized territory of the United States, but he believed that an examination of the text of the Constitution showed, "that the word state is used in the Constitution as designating a member of the union, and excludes from the term the signification attached to it by writers on the law of nations." With his admitted Federal leanings, had he permitted himself for a moment to wander from the literal interpretation of the word as used in the Constitution, nothing would have been easier than to hold that in the 3d Article, the word "state" meant

⁶⁴ 2 Cranch's Reports, 445 (1804).

⁶⁵ 1 Wheaton's Reports, 91 (1816).

any organized government within the boundaries of the United States.

The case of *New Jersey vs. Wilson*⁶⁶ involved a question arising under that clause in the Constitution which declares that: "No state shall . . . pass any . . . law impairing the obligation of contracts." The colonial legislature of New Jersey entered into an agreement with certain Indians resident in the colony, by which the Indians relinquished their claims to certain lands, and, in return, the colony granted other lands to trustees for the use of the Indians, and agreed that the land so granted should be forever free from taxation. After the adoption of the Constitution the State of New Jersey passed an Act permitting the Indians to sell these lands. Nothing was said in the Act about the exemption from taxation. Several years afterwards the State Legislature attempted to tax the lands in question. The owners resisted on the ground that the action of the State impaired the obligation of a contract, and, the Supreme Court of the State, upholding the constitutionality of the State's action, the owners appealed to the Supreme Court of the United States. Marshall held that the purchasers entered into all the rights of the Indians; that the original agreement was a contract; and that the Act subjecting the land to taxation impaired its obligation. The decision from a practical view point was most unfortunate. In cases arising since Marshall's day, the

⁶⁶ 7 Cranch's Reports, 164 (1812).

Court has declared that a state legislature cannot barter away its police powers,⁶⁷ and there would appear to be no distinction in principle, between a contract which deprived a state of its power of taxation, and a contract which deprived it of the right to care for the health of the citizens of the state. If the case were now one of first impression, there is little doubt but that the decision would be in favor of the State. We would bring to bear, as limiting the literal interpretation of the words of the Constitution, a theory of sovereignty essentially modern, and declare that no government could make a contract depriving it of the right of taxation. But Marshall did not deal in theories. To him the case of *New Jersey vs. Wilson* was one without difficulty. The Constitution said that a state should not impair the obligation of a contract. The word 'contract' was not limited, apparently all contracts being included. The Constitution did not say that only the contracts of private persons could not be impaired by the State, and in *Fletcher vs. Peck* he had already held, that a state could not impair its own contracts. It would give a false impression to say that Marshall did not believe in implied limitations on the legislative power of a state to enter into contracts. The correct statement would appear to be, that he never thought of the possibility of such limitations; or if he did, that it would have been foreign to his whole method

⁶⁷ *Fertilizing Company vs. Hyde Park*, 97 United States Reports, 659 (1878).

of treating a constitutional question, for him to have taken the position that courts could recognize such implied limitations.

In construing the intentions of parties to a contract, if we confine ourselves to the words in which the parties have attempted to embody their intention, the work of interpretation is immensely simplified. All difficulty, however, will not have disappeared. First; the parties may use a non-technical word which in popular use has various shades of meaning, and the question arises, in what sense have the parties to the instrument used the word? Second; an agent is appointed; the end to be attained is clearly indicated, but the means to be employed are not, and we have to decide whether a particular means used is within the intent of the parties. Both of these difficulties also occur in the interpretation of the Constitution.

The first is well illustrated by the question involved in *Gibbons vs. Ogden*. As we have already explained, the word "commerce" is used in common speech in several ways. Marshall was obliged to decide the intended scope of the word as used in one of the grants of power to the Federal Government. To do this he turned to the well known objects which caused the people of 1787 to seek "a more perfect union," and in these objects finds sufficient cause for the conclusion that, as used in the Constitution, the word "commerce" is intended to describe every form of commercial intercourse. In thus turning to the

objects in view at the time of the adoption of the Constitution in order to ascertain which one of several possible meanings the framers intended to attach to the word, he was merely following a method universally applied when we are confronted with a similar difficulty in the interpretation of a contract.

The second class of difficulties referred to is well illustrated by the case of *McCulloch vs. Maryland*. The Constitution had conferred on Congress, not all the powers of government, but many important powers. The question before the Court was the extent of the scope of the choice which Congress has in the selection of means to execute its powers. The Constitution itself gives a general rule for determining the question. It declares that Congress shall have power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers." But here again the words "necessary and proper" have several shades of meaning. It was plain that an Act would not be necessary and proper merely because in the preamble Congress had declared that it was passed for one of the enumerated purposes for which Congress may legislate. If Congress, under the pretence of exercising a power granted, could pass an act which had no relation to it, Congress could, in effect, amend the Constitution at will. But, even with the assistance of the clause quoted, to determine the limits of the range of choice possessed by Congress, presented a question, not only of vital importance, but of real difficulty. To meet

this difficulty, Marshall follows, as in *Gibbons vs. Ogden*, the only method open to one sincerely desirous of arriving, as nearly as may be, at the intent of those who adopted the Constitution. He turns to the nature and objects of the instrument he is interpreting. "In considering this question then," he says, "we must never forget that it is a constitution we are expounding." Following this method, and pointing out that the enumerated powers were conferred on Congress to "promote the general welfare, and secure the blessings of liberty," he concludes that Congress may employ any means which are plainly adapted to one of the subjects on which the Constitution expressly declares Congress may legislate.

It is especially important that we should emphasize his strict adherence in *McCulloch vs. Maryland* to an accepted canon for the construction of a written instrument, because it is in this case that he uses the term "implied powers;" and, as stated, it is to the use of this term that we may trace a great deal of the popular misconception of the character of his work in constitutional law. As has been pointed out, Marshall was peculiarly happy as a phrase maker. The opinion in this case contains many illustrations of his facility in this respect. But the term "implied powers," which he borrowed from Hamilton, though he employs it only once, was, as the event has proved, most unfortunate. By implied powers, Marshall merely intended to indicate the

right of Congress to a choice of means to execute the enumerated powers. The term itself, however, does not naturally call before the mind the means by which an express power may be carried out, but rather the idea, that besides the fields of Federal legislation as enumerated in the Constitution, there are other fields into which Congress may enter, not because of express grants in the Constitution, but because Congress is the legislative branch of the national government of the United States. In this last and proper sense of the term there may be implied powers, but it is important to note that Marshall never said in *McCulloch vs. Maryland* or in any other case that any such implied powers existed. Furthermore, and this is the point on which it is important to lay present stress, had Marshall held in any case that Congress could legislate for an end not mentioned in the Constitution merely because we are a nation, he would have violated that rule of construction to which in all other cases he strictly adhered. He, at least, lived up to his oft repeated declaration, that the government of the United States is one of enumerated powers.

The exposition of the Constitution of the United States is a special branch of law, having little connection with other branches. Yet it is no exception to the rule, that problems which arise in one branch of the law, can often be solved only by referring to legal principles and conceptions which have been worked out in other branches. Take, for instance,

the contract clause of the Constitution. No state may impair the obligation of a contract. What is a contract? What is the obligation of a contract? These are questions whose answers require a knowledge of our common law. Marshall's constitutional opinions which to-day we perhaps find least satisfactory are those in which the question to be solved necessarily involves the discussion of what we may call a common law conception, especially those cases in which he was required to construe the restriction imposed on the states in respect to impairing the obligation of contracts. In great part the criticism of these opinions arises from the fact that our common law conceptions, and to some extent our legal terminology, has undergone considerable modification since Marshall's day. At the same time, Marshall, though a good, was not a great common law or equity judge. In these fields he did not make new law nor clarify what was obscure. He was not a leader; he assumed the correctness of the legal definitions of his day. Had he analyzed the problems of private law as carefully and as exhaustively as he did those of constitutional law, it is probable that his opinions on the "contract clause" would be to-day as satisfactory as his opinions on other clauses of our Constitution. The extent to which his attitude of unthinking acceptance of prevalent common law doctrines affect some of his constitutional opinions is shown in *Fletcher vs. Peck*, and *Dartmouth College vs. Woodward*, two of his most criticized and

most celebrated cases.⁶⁸ Paradoxical as it may appear, an examination of Marshall's opinions in these cases show us that his only limitation as a constitutional lawyer, comes from the fact that he was not a great master of our common law. The last case in which he was called upon to discuss the contract clause was *Ogden vs. Saunders*.⁶⁹ His opinion in this case illustrates perhaps better than any other this limitation; because in it, taken as a whole, he displays nearly all those qualities which make his constitutional opinions more satisfactory than those of any other Judge. It is the only constitutional case in which he dissented from the judgment of the Court. The State of New York passed a bankrupt law. After the passage of this Act, two citizens of New York made a contract in New York. A suit was brought on this contract in a court of the State, and the defendant pleaded his discharge under the law. The plea was allowed and the plaintiff appealed to the Supreme Court, where, by a vote of four to three, the decision of the state court was affirmed. Marshall, being one of the minority, maintained that the provision prohibiting a state from impairing the obligation of a contract, prevented the states from passing any bankrupt act which discharged a debtor from his contract; the fact that the law was in force when the contract was made, not

⁶⁸ For an examination from the point of view indicated in the text of these cases, see an article by the author in *American Law Register*, for June, 1907.

⁶⁹ 12 Wheaton's Reports, 212 (1827).

affecting the question, the prohibition having a prospective as well as a retrospective operation. To maintain this position he tries to show, that while the remedy for a breach of contract is given by positive law, the obligation is distinct from the remedy, being derived from the contract or act of the parties. Thus he argues that a law existing at the time the contract is made which discharges the plaintiff from its obligation, impairs that obligation, and is prohibited by the Constitution. This theory, as a theory of contracts, is open to serious criticism, and it may be admitted that Marshall's opinion fails to meet all objections. But when he turns from his theory of contractual obligations to the text of the Constitution, at once the value of his argument rises to the highest plane. He shows from other provisions in the Constitution, and from the apparent objects which the framers had in view in inserting the contract clause, that we are required to interpret the prohibition as applying to future as well as past contracts; giving us, in his elaborate argument, a splendid example of careful textual analysis.

It is perhaps fortunate that Marshall was not a great student of our common law. The subject is so vast that the masters have done no other work that counts. Marshall is our specialist in constitutional law, and, like other great specialists, we find him at his best when his work is wholly in his chosen field; subject to criticism only when the problem he is asked to solve, though primarily a problem in his

specialty, requires that part of the work necessary for its solution should be done in other fields; fields he may know a great deal about, but in which he is not a specialist.

An attempt has been made to show the qualities of Marshall's constitutional opinions. His injunction to his children was never to write his biography, because his life was in his decisions, which would live if right, and be reversed if wrong. Yet, back of a court's decisions, strengthening or weakening their effect, there is always the personality of the Judge. And of the wonderfully persuasive force of Marshall's personality there is abundant evidence. His influence over his associates, already referred to, is but one example,—though a most impressive one. From the moment of the delivery of his opinion in *Marbury vs. Madison* the legal profession knew that he was a great Judge. Each year added to his reputation, and made for a better appreciation of his intellectual and moral qualities. The Bar of the Supreme Court during his chief-justiceship was the most brilliant this country has ever known. Leaders, not only of legal, but of political thought were among its members; one, Webster, was a man of genius and commanding position. To a very great degree Marshall impressed on the members of this bar, and on the profession generally, his own ideas of the correct interpretation of the Constitution, and his own love for the Union. He did this, not merely by his arguments, but by the influence which was

his by right of his strong, sweet nature. Statesmen and politicians, great and small, were at this time, almost without exception members of the Bar. To influence the political thought of the Bar was, to a great extent, to influence the political thought of the people.

Though the direct influence of Marshall's constitutional arguments was largely confined to the members of the Bar, the influence of his personality was felt by practically all classes of people. When he was appointed he was, as has been said, perhaps the most popular Federalist in the country. His supreme fitness for the judicial office was, however, probably not generally recognized until after the trial of Aaron Burr. Over this trial, the most dramatic in our history, he presided with a dignity, impartiality, and ability never surpassed.

Burr himself brilliant, erratic, unscrupulous, casts a certain fascination over each succeeding generation of historical students, as he did over his contemporaries. In his character there is something alluring. Its dominant note is mystery. Though he lived many years after the trial, and though everything in connection with his ill-starred expedition has been subjected to the most painstaking investigation, the real nature of his aims, whether to attack Mexico, or detach from the Union the portion of the United States west of the Alleghanies, or both, remains, and seems always likely to remain, uncertain.

To dream of conquest or of the dismemberment

of the country is not treason. The Constitution provides that: "Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort." And it is also provided that: "No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court."

Burr was indicted in Richmond for an overt act of treason in the fall of 1806 on Blennerhasset's Island. The trial took place in the United States Circuit Court for the district of Virginia; the Island, though in the Ohio River, being at that time, in the state of Virginia. The indictment, to follow its technical language, alleged that Burr, "not having the fear of God before his eyes," "but, being moved and seduced by the instigation of the devil," had with upwards of thirty others assembled on Blennerhasset's Island on December 10th and 11th, 1806, and that this assembly "armed and arrayed in a warlike manner," had "falsely and traitorously joined themselves together against the United States."⁷⁰

The trial began on the 10th of August, 1807. It took until the 17th to secure a jury. Though Burr was indicted for treason on Blennerhasset's Island, it was known to everyone, that at the time the alleged acts of levying war had been committed, Burr was, not only not on the Island, but hundreds of miles away in another state. The Government had evi-

⁷⁰ Robertson's Trial of Aaron Burr, vol. I, 483, 484.

dence of a conspiracy to raise an armed force, perhaps to attack New Orleans, in which conspiracy Burr was the prime mover. They probably had evidence, that subsequent to the meeting on Blennerhasset's Island, a small force under Burr, had joined the small force which had previously assembled on the Island, making in all about one hundred men, and proceeded down the Ohio and Mississippi Rivers to a few miles above Natchez, where Burr had voluntarily surrendered himself to George Mead, the acting Governor of Mississippi, who, on the alarm created by the denunciation of Burr's plans, had assembled a small force of militia to oppose him. But the Government could not even prove that Burr had caused the force mentioned in the indictment to assemble on the Island.

Looking back to-day over the events which led up to this trial and the trial itself, we see a succession of errors on the part of Jefferson that might have resulted in a drama ending in a tragedy,—the execution of Burr as a result of a conviction for treason, which would probably have been improper in any event, certainly improper in view of the law, the wording of the indictment, and the character of the acts which the United States alleged it stood ready to prove. Jefferson had blundered in not arresting Burr and stopping his preparations when he first had evidence of the nature of his plans. His negligence had permitted those plans to go far towards maturity when he received a letter from General Wilkinson,

the Commander at New Orleans, denouncing Burr as contemplating the detachment of the western country from the Union. Instead of merely publishing the information and ordering Burr's arrest, Jefferson inflamed the popular mind by denouncing Burr as a traitor. From the moment this proclamation was issued, the President, instead of standing for the calm and efficient execution of the law, used his immense popularity in the country to excite the popular mind, not only against Burr, but against Burr's counsel, and all who stood in the way of conviction. When a popular President loses his head and declares that the country is in danger if traitors are not punished, even the more intelligent portion of the people lose their heads also. By the time the prisoner was brought to trial, though he had become a hero to the few, the many had already made up their minds that only by legal chicanery could he escape the gallows. With one voice they clamored for conviction. In Richmond the local prejudice was so strong that it was impossible to secure an unprejudiced jury. Fortunate was it for Burr, but still more fortunate for the country, that the trial was presided over by a man who combined as did Marshall, ability, courage, and absolute control of nerves and temper.

Time is a good preservative. What it keeps is usually worth keeping; the trivial and the petty it permits to pass into oblivion. Almost one hundred years have elapsed since the curtain descended on the

last scene of the trial. The Senators, Representatives, and minor politicians who, during the long, hot summer elbowed one another at the Eagle tavern or in the House of Burgesses where the court was held; the numerous array of able counsel; the accused, the judge, the jury, all are dead. Of the eloquence of counsel, that part of Wirt's last speech in which he asks, "Who is Blennerhasset?" alone survives, a fine example of a style of oratory no longer prevalent. When we recall the trial itself, though we see Wirt, the able and eloquent attorney for the prosecution, and Luther Martin, the leader of Burr's forensic forces, drunken, rollicking, devoid of good taste, but as a lawyer unsurpassed; though the mind calls up before it the dignified figure of Aaron Burr, and fills in the background of the court room with portraits more or less distinct of the other actors in those memorable scenes, the form which stands out as the central figure is that of the Chief-Justice,—the one really great man in that brilliant throng. We feel the power of expression in his wonderful eyes and the calm dignity which emanated from his personality. As we read the following passage which practically closes his principal opinion, the opinion which, excluding all remaining testimony which the Government had to offer, necessarily brought the case to an end favorable to the prisoner, we seem to hear the even tones of his voice; and, realizing the excitement in the country, and the strain of the days that preceded, there comes to us as there

came to his audience, the thrill of confidence in the man and pride in the majesty of the law.⁷¹

Much has been said in the course of the argument on points on which the court feels no inclination to comment particularly; but which may, perhaps not improperly, receive some notice.

That this court dares not usurp power is most true.

That this court dares not shrink from its duty is not less true.

No man is desirous of placing himself in a disagreeable situation. No man is desirous of becoming the peculiar subject of calumny. No man, might he let the bitter cup pass from him without self-reproach, would drain it to the bottom. But if he have no choice in the case, if there be no alternative presented to him but a dereliction of duty, or the opprobrium of those who are denominated the world, he merits the contempt as well as the indignation of his country who can hesitate which to embrace.

Jefferson might rage as he read the opinions of the Court; the excited inhabitants of Baltimore on learning the result of the trial might burn the judge in effigy along with Burr and his leading counsel, thus giving the latter the opportunity to deliver to them an immortal piece of sarcasm. But the brilliant throng which had crowded the rooms from day to day, had seen the judge whose calmness was in strange contrast to their half expressed excitement; moved by the impelling force of his personality, they had realized that this man held the scales of justice with impartial balance; that his known dislike and distrust of the President who wanted the conviction did not affect his judgment, any more than the fact that the prisoner at the Bar had slain

⁷¹ Robertson's Trial of Aaron Burr, vol. II, 549.

in the course of a career full of little but harm, one of his dearest friends. Furthermore, they had listened to his analysis of the legal questions arising in the case and with few exceptions they knew the result was correct. Thus, as they went out from the Court room to all parts of the country they carried with them the impress of the personality of the great judge.

Twenty-four years afterwards Miss Harriet Martineau, tells us of the "tall, majestic, bright-eyed old man, so fresh, so present to the time," and gives us the following picture of the Supreme Court on the occasion of the delivery of the opinion in the case of the Cherokee Nation vs. The State of Georgia.⁷²

I have watched the assemblage while the Chief Justice was delivering a judgment;— the three Judges on either hand gazing at him, more like learners than associates;— Webster standing firm as a rock, his large, deep-set eyes wide awake, his lips compressed, and his whole countenance in that intense stillness which instantly fixes the eye of the stranger;— Clay leaning against the desk in an attitude whose grace contrasts strangely with the slovenly make of his dress, his snuff-box for the moment unopened in his hand, his small grey eye and placid half-smile conveying an expression of pleasure which redeems his face from its usual unaccountable commonness;— the Attorney-General (William Wirt), his fingers playing among his papers, his quick black eye, and thin tremulous lips for once fixed, his small face, pale with thought, contrasting remarkably with the other two; — these men, absorbed in what they are listening to, thinking neither of themselves, nor of each other, while they are watched by the groups of

⁷² 5 Peters' Reports I, 1831. Retrospect of Western Travel, by Harriet Martineau, vol. I, 275, 276.

idlers and listeners around them,— the newspaper corps, the dark Cherokee Chiefs, the stragglers from the far west, the gay ladies in their waving plumes, and the members of either House that have stepped in to listen,— all these I have seen at one moment constitute one silent assemblage, while the mild voice of the aged Chief-Justice sounded through the Court.

For the first thirty years of his chief-justiceship Marshall's life was a singularly happy one. With the exception of his biography of Washington, undertaken in 1802, and executed within a few years, he confined himself almost exclusively to his labors as judge. Prior to 1827 the Supreme Court met on the first Monday in February, and usually adjourned before the end of March. Even after 1827, when the Court met a month earlier, he did not have to remain in Washington for more than three months. During the rest of the year, with the exception of a visit to Raleigh which his duties as Circuit Judge required him to make, and also a visit to his sons in Fauquier County, he lived at his home in Richmond. His house on Shockhoe Hill, which is still standing, was thoroughly homelike and comfortable. Congenial work, with time to do it thoroughly and well, were his; his also were ample leisure and sufficient means to gratify his tastes. He took much interest in agriculture, and purchased a farm within a few miles of Richmond to which he often rode or walked. He was fond of good books, especially good novels; he liked a good dinner, but best of all he enjoyed the society of his friends. Full of anec-

dote and humor, his temper and training made him an ideal listener. The late Professor Thayer says:⁷³

Of Marshall's simple habits, remarkable modesty, and engaging simplicity of conduct and demeanor, every one who knew him speaks. These things were in the grain, and outlasted all the wear and tear of life. "What was it in him which most impressed you?" asked one of his descendants, now a distinguished judge, of an older relative who had known him. "His humility," was her answer. "With Marshall," wrote President Quincy, "I had considerable acquaintance during the eight years I was member of Congress, from 1805 to 1813, played chess with him, and never failed to be impressed with the frank, cordial, childlike simplicity and unpretending manner of the man, of whose strength and breadth of intellectual power I was . . . well appraised."

This simplicity of manner, combined with his plainness of dress, were not only the cause of many ludicrous mistakes, but sometimes gave him the opportunity to administer a gentle rebuke.⁷⁴

It is related that, while at the market on one occasion, a young man, who had recently removed to Richmond, was swearing violently because he could hire no one to take home his turkey. Marshall stepped up, and, ascertaining from him where he lived, replied, "That is on my way and I will take it for you." When arrived at his dwelling, the young man inquired, "What shall I pay you?" "Oh, nothing," was the rejoinder, "you are welcome, it was on my way, and no trouble." "Who is that polite old gentleman who brought home my turkey for me?" inquired the other of a bystander, as Marshall stepped away. "That," replied he, "is John Marshall, Chief-Justice of the United States."

⁷³ Thayer's *Marshall*, pp. 137, 138.

⁷⁴ *Flanders' Life of Marshall*, pp. 244, 245.

For more than forty years he was a member of the Barbecue, or Quoit Club of Richmond, composed of some thirty judges, lawyers, doctors, clergymen, and merchants. They met every two weeks from May to October; played quoits and backgammon, and afterwards sat down to a good dinner at which a fine fat shoat, well cooked on the coals, was served, also a dessert of melons, and a famous punch, the receipt of which, still preserved, permits ice, but is careful to exclude water. A visitor at one of these meetings illustrates the affection felt towards the Chief-Justice, by repeating a story current among the members, that an old Scotch gentleman, being once called upon to decide between Marshall's quoit and that of another gentleman, went so far as to declare that, "Mister Mareshall has it a leettle," though it was quite evident that the contrary was the fact.

He loved not only to meet his friends, but to help them, and his acts of kindness involving personal sacrifice were many. One instance is thus related by the writer in Howe's *Virginia Historical Collections*:⁷⁵

In passing through Culpeper, on his way to Fauquier, he fell in company with Mr. S., an old fellow-officer in the army of the revolution. In the course of conversation, Marshall learned that there was a lien upon the estate of his friend to the amount of \$3,000, about due, and he was greatly distressed at the prospect of impending ruin. On bidding farewell, Marshall privately left

⁷⁵ Howe's *Virginia Historical Collection*, p. 266.

a check for the amount, which being presented to Mr. S., after his departure, he, impelled by a chivalrous independence, mounted, and spurred on his horse until he overtook his friend. He thanked him for his generosity, but refused to accept it. Marshall strenuously persisted in its acceptance, and the other as strongly persisted in not accepting. Finally it resulted in a compromise, by which Marshall took security on the lien, but never called for pay.

Thus, with the ideal family relations, with hosts of friends, with congenial work, the years passed; each bringing with it, in ever greater measure, love and respect.

In the early part of 1831 great apprehensions were felt for his health. In October he visited Philadelphia, and there underwent the torture of an operation for lithotomy before the days of ether. It was the last operation performed by the celebrated Doctor Physic; over one thousand calculi being removed. The disorder never returned.

On Christmas Day, 1831, his wife died. This was the greatest calamity that could have befallen him. "From the moment of our union, to that of our separation," he says in a touching tribute to her memory, "I never ceased to thank Heaven for this its best gift. Not a moment passed in which I did not consider her as a blessing from which the chief happiness of my life was derived."⁷⁶

On returning from Washington in the Spring of 1835, he suffered severe contusions, "from an acci-

⁷⁶ Meade, *Old Churches and Families of Virginia*, vol. II, 223, note.

dent to the stage coach in which he was riding." His health, which had not been good, now rapidly declined, and in June he was induced to return to Philadelphia for medical attendance. There, on the morning of the 6th of July, he died. His body, which was taken to Richmond, lies in Shockhoe Hill Cemetery under a plain marble slab on which is inscribed words written by himself two days before his death:

John Marshall, son of Thomas and Mary Marshall, was born the 24th of September, 1755. Intermarried with Mary Willis Ambler, the 3d of January, 1783. Departed this life the (6th) day of July, 1835.

Measured by the permanence and importance of the results he achieved, Marshall is one of the very greatest of Americans. To have made his Court the recognized interpreter of our fundamental law, to have more than any other individual given to the people of the United States a clear understanding of the Constitution, and a love for the principles on which our Federal system is based, are services worthy of lasting remembrance. By prior preparation, by intellectual endowment, by the sweetness of his temper and the marvelously persuasive force of his personality, he was ideally fitted for the work which, in the providence of God, he was called upon to do.

He lived long enough to feel the sure approach of the Civil War. In Richmond, during the last years of his life, he was surrounded by neighbors

and friends who loved him, but not the things for which he had labored. A sense of personal failure as well as a dread for the future of his country, pervades and saddens his private letters. Yet, had he but known it, even then the future of his country was secure; and the perspective of time enables us to perceive, that no one has contributed more towards that love of the Union which preserved the nation in 1860, and which makes us a nation to-day, than this great judge,—this clear-brained, simple, strong, single-hearted man.

FRANÇOIS XAVIER MARTIN.

FRANÇOIS XAVIER MARTIN.

From an engraving copied from an old portrait since destroyed.
Artist unknown.



FRANÇOIS XAVIER MARTIN.

1762-1846.

BY

WILLIAM WIRT HOWE,

of the Louisiana Bar; ex-President of the American Bar Association.

THE subject of this sketch may possess special interest from the fact that he was born and educated in France; that he practiced law for upwards of twenty years in one of our common law states; and then, moving to the territory which is now Louisiana, pursued his profession and sat on the bench for a still longer period, under a system largely derived from Rome, France and Spain.

François Xavier Martin was born on the 17th of March, 1764, in the busy seaport of Marseilles. So far as we may know, his family were plain serious people, from whom his sole inheritance consisted of a robust physique, a keen intelligence and a powerful will. It is said that he was educated for the priesthood, but he did not develop any vocation for such a life, and never took any orders. Such a training, however, was a good preparation for his future studies, and when he left the seminary he was well grounded in at least Latin and French.

At the age of eighteen, Martin set out to seek his

fortune, and is next heard of in the French Colony of Martinique. We have no particulars of his life there, but we may infer that he was employed in some commercial house, for soon after he appears in Newbern, North Carolina, looking after a cargo of molasses that had gone astray. Whether he found it or not, it is impossible now to affirm; but, at any rate, his affiliation with Martinique must have been slight, for he remained at Newbern. The war of the American Revolution was near its close, but tradition asserts that he enlisted in the Continental army. His military career was short. Having been sent out on scout duty, he came rushing back with a report that the enemy was approaching. The enemy proved to be a row of red flannel shirts hung out to dry. The young recruit was painfully, but unconsciously, near-sighted, and was really unfit for active military duty.

Returning to Newbern, he taught French and studied English, and then undertook to become a printer. In after life he used to relate that when he first applied for employment in that capacity he had never set a type, and yet he managed to get along in some way, and his want of experience was never discovered. His next venture was to publish a newspaper, which he used to peddle himself, news-boy fashion, throughout an extensive neighborhood. He also printed almanacs, spelling-books and translations from the French. But he was not satisfied with the life of a printer and publisher. He added

another province to his intellectual dominions, and in 1789, at the age of twenty-seven, was admitted to the bar of North Carolina. For some time he was both lawyer and publisher; and among the books issued from his establishment, or from that of Martin and Ogden, we find a considerable list prepared by Martin himself,—such as Statutes of England in force in North Carolina; Powers and Duties of a Sheriff; a Treatise on Executors; a volume of Taylor's Reports; a translation of Pothier on Obligations, and a Revision of the Laws of North Carolina. He also collected materials for a history of North Carolina, a work afterwards published in the form of annals. In 1806 he was elected a member of the legislature, and served for one term.

Martin passed about twenty-eight years in North Carolina. He had become a leading lawyer,—jurist rather than advocate,—and by his industry and economy had laid up what might then have been considered a fair competence. He had attained the age of forty-seven years, and might have thought it time to take a little rest. The fact was that his juristic life had just begun.

In 1809, President Madison appointed Mr. Martin a judge of the territorial court of Mississippi. He accepted the position and filled it for about a year; when, on the 21st of March, 1810, he was transferred to the bench of the Superior Court of the territory of Orleans, and he removed to the city of New Orleans. To appreciate the work he then took

up and wrestled with for thirty-six years more, it will be useful to say something of the legal history of the Louisiana Purchase of 1803. When the North American possessions of France extended from the mouth of the St. Lawrence, by way of the Great Lakes, to the mouth of the Mississippi, the northern portion was called Canada, or New France, and the rest Louisiana. Their legal history was similar. By royal decree the general laws and ordinances of France and the "Custom of Paris" were extended to each. At the time, as is well known, France was divided in the juristic way, into that southern portion known as the Country of the Northern Law, and that northern portion known as the Country of the Customary Law. The former had grown up under the influence of such complications as the Edict of Theodoric and the Breviary of Alaric II; the latter had been governed by a composite system containing remains of Roman law, mingled with Teutonic customs, and modified by local grants and charters, and by the feudal system. There were many of these customs in different localities, but the most important, naturally, was that of Paris, where the study of Roman and local law had been pursued with much zeal. We might compare such a growth to the French language itself, which had unfolded in much the same way, and had been formed of similar factors, Latin at base, but modified by the influences above mentioned. Interesting references to the Custom of Paris, as existing

in New France, may be found in the legislation and reports of Michigan and Wisconsin.¹

Louisiana remained under the domination of the general law and ordinances of France and the Custom of Paris until 1769, when the province having been ceded to Spain, Governor O'Reilly issued a code of instructions in reference to procedure according to the laws of Castile and the Indies, together with an abridgment of criminal law, and some directions in regard to wills. From this time, as Judge Martin remarks in his history of Louisiana, a work to be mentioned hereafter, it may be said that the territory was governed by the laws of Spain, instead of France; but the elements of the two systems were so much alike in derivation and development that the transition was hardly perceived. Spanish law was also Roman law, modified by Visigothic customs and other influences, and the *Siete Partidas* and similar codes could be apprehended, in a way, by the French colonists. Moreover, in the vast domain called Louisiana there were few settlements outside of the present state that called for any systematic jurisprudence.

The acquisition of the Colony by the United States in 1803 introduced some changes. The Louisiana Purchase was divided by acts of congress into two parts; one the Territory of Orleans, including about the area of the present State of Louisiana,

¹ Lorman vs. Benson, 8 Michigan Reports, 18, 25; Coburn vs. Harvey, 18 Wisconsin Reports, 156, 158.

and the other styled at first the District of Louisiana, but eventually erected into the Territory of Missouri. There were few inhabitants in this latter region, save Indians, and the new settlers came mostly from common law states. Spanish law was either forgotten or disliked; and by 1816 the territorial legislature of Missouri formally adopted the common law as the basis of jurisprudence.²

In the Territory of Orleans two important changes were made. It was understood that the criminal law ought to conform to that of the rest of the country, and so in 1805 two well drawn statutes were adopted, by which the common law was made fundamental in criminal matters, both in definition and practice. In 1808 a civil code of law was adopted, suggested by the Code Napoleon, which remained in force until the extensive revision of 1825. The civil laws, however, outside of this Code of 1808, were left unrepealed, and were a source of some trouble until done away with in 1828. Judge Martin says in his history that this compilation of 1808 was used "as an incomplete digest of existing statutes which still retained their empire, and their exceptions and modifications were held to affect several clauses by which former principles were absolutely stated. Thus the people found a decoy, in what was held out as a beacon. *The Fuero Viejo, Fuero Juezo, Partidas, Recopilaciones, Leyes*

² An account of this legislation will be found in the case of *Grande vs. Foy*, Hemstead's Circuit Court Reports, 185.

de las Indias, *Autos Accordados* and *Royal Schedules* remained parts of the written law of the territory, when not repealed expressly or by necessary implication. Of these musty laws copies were extremely rare; a complete collection was in the hands of no one; and of very many of them not a single copy existed in the province. To explain them, Spanish commentators were consulted, and the *corpus juris civilis* and its own commentators were resorted to; and to eke out any deficiency, the lawyers who came from France or Hispaniola, read Pothier, d'Aguesseau, Dumoulin, etc.

Courts of justice were furnished with interpreters of the French, Spanish and English languages. These translated the evidence and the charge of the court when necessary, but not the arguments of the counsel. The case was often opened in the English language, and then the jurymen who did not understand the counsel, were indulged with leave to withdraw from the box into the gallery. The defense, being in French, they were recalled, and the indulgence shown to them was enjoyed by their companions who were strangers to that language. All went together into the jury room, each contending the argument he had listened to was conclusive; and they finally agreed on a verdict in the best manner they could.

It is easy to perceive that Judge Martin coming in 1810 to be a member of the Superior Court of the Territory had before him a difficult task. There was, practically a jurisprudence to be created. How well he performed his part of the task, not only in the Territory but in the new state, is a matter of history.

The following letter, which has as yet remained unpublished, gives a quaint picture of the new territory and the difficulty of reaching it ninety-five years ago:

NEW ORLEANS, March 22, 1811.

Dr. Sir,

Your son has not deceived you in the idea he has given of the banks of the Mississippi. There are, I believe, no lands in the U. S. that repay so well the toils of the husbandman. Gov. Sergeant, who is a neat farmer and a pen and ink man, tells me his lands yield him \$270. cash a year, in the neighborhood of Natchez. If you contemplate a removal, I dare (say) you cannot do better than coming over. I am told the best place to settle is in this territory, on the west side of the river in the counties of the Attakapas and the Opelousas, or on Red River and its branches. People are moving thither, even from the Mississippi. The Attakapas is the county immediately on the Ocean. There are sugar lands, I am told, to be had very cheap. No sugar estates, at least very few, are to be found there yet, owing to the expensiveness of this kind of establishment, but there are cotton plantations, very superb indeed. The Opelousas and the next county, and the Red River settlements are higher up and extend as high up as the latitude of the city of Natchez. All these are cotton countries. These afford a pretty good field for our profession. But if this was the object, this city is the best spot in the U. S. A lawyer of common talent makes from \$4 to \$5,000; several make \$8 or \$10,000. What is understood as a fee in ordinary parlance is \$500. They call a good fee \$1,000 or \$1,500.

Intending to visit this river, the best season of the year is to start the first of September from your home, and make the best of your way for Knoxville; if on horse back the shortest way is by Salisbury & Buncombe County; if you choose to come in a chaise (which may be done, for I did it without any other difficulty than slow movement) go to Salem, N. C. and from there

via Montgomery and Wythe Court House, Va. to Knoxville, thence to Nashville, where you'll wait a few days for a caravan, that is to say, a few companions to cross the Indian nation. If you bring a servant, one or two companions are as much as you may desire. If you are not in a chaise, you can take a packhorse to carry provisions. If you do not think it inconvenient to travel on horse back, you'll find that the easiest and surely the quickest way. The worst of the road for a chaise is betwixt Knoxville and Nashville, the roads there being stony and uneven. Between Nashville and Natchez, a distance of about 500 miles, the road is not bad after you cross the Tennessee river. If you are in a chaise you will, however, progress much slower, and the main inconvenience is that you will not be able to get every night to a house, and sometimes will have to stop early in the afternoon near a good spring, lest you may have no water near at your halting-place at night, and sleep in the woods. I found it necessary to camp out but twice; yet I found the precaution I took of getting a tent made at Nashville a very good one, for in the houses of the Indians vermin abounds, and with my tent I did very well on a piazza or near the fodder stack. If you travel in a chaise you'll easily carry a tent, and I advise you taking a three or four gallon keg of water behind the chaise. I was 20 days from Nashville to Natchez — 15 of them among the Indians — travelling not more than 25 miles a day. Going a horse back you may go from 30 to 35 very well and be at a half-breed's house almost any night, or at a white man's, for there are several such on the road.

October is a good month to cross the Indian country, for it is generally a dry month and the chief difficulty lies in crossing large swamps; in hot weather one is apt to be mired. Provisions are also then abundant, the crops being just housed, and a man and his horse find plenty of food, which is not long the case, for the Indians, being lazy and improvident, are soon out of provisions. During this season the road is full of travellers and company is easily had. I would not, however, be afraid of going thro' alone on the score of danger, for the Indians are very quiet, but it would

be a gloomy journey without company. The best security against any insult from the Indians is to avoid conversing with them as much as possible, but there are few instances of their being troublesome,—the most disagreeable thing is to fall in with a drunken party of them.

In the months of July and August the insects are very troublesome, a large fly especially, called the Yellow Jacket. Swarms of them will sometimes rest on a horse and worry him to death.

If you started in the spring you might take water at Knoxville or Nashville, but then you should endeavor to be there about the first of March or April.

It would be a speedy way to return by water to Norfolk, if you pursued your route to New Orleans.

If you preferred a southern route you might come to Athens or Milledgeville in Georgia, thence to Col. Ben Hawkins, the Indian Agent among the Creeks, thence to Fort Stoddart and thence to Natchez. This route is between 2 or 300 miles nearer, but you have a greater portion of Indian country to travel thro', the nations you pass thro' are less civilized, the road worse and less travelled, and the water courses more frequent and much wider.

If you do come, you must expect to be on this river three or four months to view the country right, the Mississippi Territory, West Florida down to this city, then cross the river to the Atakapas, Opelousas, Pointe Coupée and Red River.—You'll find a great variety of situations on which you may choose an agreeable spot.

I still keep working on my history of N. Carolina. I am told there may be found in the counties on Albemarle Sound a copy of a pamphlet and map printed by order of Lord Granville, at the time of running the line. If you come across it, get it for me and send it to M. C. Stephens, the Cashier of the Bank at Newbern, my agent.

They keep me tightly at work here, I assure you. They give me a salary of \$2,000, & \$666 2-3 for my travelling expense, but they get the worth of their money out of me, I assure you. For

there is not a day in the year that the court does not sit somewhere in this territory, one of the courts sits 4 months without interruption. I seriously think to go to the bar.

I was for sometime last year your son's messmate, at Washington's (Mississippi) and was very much pleased with him. I again had the pleasure of seeing him for a few weeks this spring,— he is lately gone to Mobile. I was much pleased with him— He does you credit indeed.

Adieu, if you do not give me the pleasure of seeing you here — let me have that of hearing from you and of knowing that you at times think of me.

F. X. MARTIN.

By act of Congress of 1811, the inhabitants of the territory were authorized to form a constitution, with a view to the establishment of a state government. The debates in the national House of Representatives on this bill were long and entertaining. Josiah Quincy, of Massachusetts, opposed the measure with something like ferocity; denied the right to admit the proposed new state, and declared that "if this bill passes, the bonds of the Union are virtually dissolved; that the states which compose it are free from their moral obligations, and that, as it will be the right of all, so it will be the duty of some, definitely to prepare for a separation, amicably if they can, violently if they must." Mr. Quincy was here interrupted and called to order by Mr. Poindexter, the delegate from Mississippi; but repeated his remarks, committed them to writing, and handed the paper to the Clerk of the House.³

³ Gayarre, vol. III, 250.

That a Quincy, of Massachusetts, should maintain the right of secession on the floor of Congress, and should be called to order by a Poindexter of Mississippi, is certainly a fact which may be classed among the curiosities of history and politics.

The bill having been passed, however, the Constitution of 1812 was framed and adopted, and in April of that year, the Congress passed an act for admission of the state to the Union, by the name of Louisiana. The territorial courts ceased to exist, and Martin was no longer a judge. He was, however, appointed attorney-general of the new state, and so acted during the exciting events of the war with England, and until February, 1815, when he was appointed a judge of the Supreme Court of the state. At this time he was fifty-three years of age. He seemed to take a new lease of life, for he sat upon that bench until 1846, a period of thirty-one years. During this lengthy term, he was not content with a formal discharge of his official duties. He did not permit himself to shrink and wither away into a clever clerk, attending to what was barely necessary and nothing more. On the contrary, while his duties as judge were performed with entire strictness, his labors in adjacent fields of intellectual work were immense.

He prepared and published reports of the Supreme Court of the territory of Orleans from 1809 to 1812, in two volumes. He began this work while he was still on the bench of that court. The title

page contains a characteristic quotation, which indicated his own views as to the necessity of reports in a community where none had ever existed. It is an extract from instructions given by the Empress of Russia to a Commission created for the purpose of framing a code of law, and is as follows:

Ces tribunaux donnent des décisions; elles doivent être conservées, elles doivent être apprises, pour que l'on juge aujourd'hui comme on ya juge hier, et que la propriété et la vie des citoyens y soient assurées et fixes comme la constitution mêmes de l'état.

The preface to the first volume is dated at New Orleans, October 30th, 1811, and expresses the views of the reporter with regard to the court of which he was a member, the duties of a judge, and the unusual condition of jurisprudence in the territory. He says:

No one could more earnestly deplore, for no one more distressingly felt, the inconveniences of our present judicial system. From the smallness of the number of judges of the Superior Court, the remoteness of the places where it sits and the multiplicity of business, it has become indispensable to allow a quorum to consist of a single judge who often finds himself compelled, alone and unaided, to determine the most intricate and important questions, both of law and fact, in cases of greater magnitude as to the object in dispute than are generally known in the state courts — while from the jurisprudence of this newly acquired territory, possessed at different periods by different nations, a number of foreign laws are to be examined and compared, and their compatibility with the general constitution and laws ascertained — an arduous task anywhere, but rendered extremely so here, from the scarcity of works of foreign jurists. Add to this, that the distress nat-

urally attending his delicate condition, is not a little increased by the dreadful reflection that if it should be his misfortune to form an incorrect conclusion, there is no earthly tribunal in which the consequences of his error may be redressed or lessened.

The territorial court having come to an end, Judge Martin continued his work as reporter, by publishing the decisions of the Supreme Court of the State, which make eighteen volumes, from the third of Martin, old series, to the eighth of Martin, new series, inclusive, the last of these volumes being issued in the year 1830. In 1817, his fame had so far reached his native place, that he was elected a member of the Academy of Marseilles. In 1841, he was made Doctor of Laws by Harvard College. In 1827, he published the History of Louisiana, in two volumes, in the form of annals. So, in addition to the usual work of a lawyer and judge, we find that he prepared and published some thirty volumes of law and history.

The Code of 1808 was revised in 1825. In the same year a Code of Practice was promulgated, which is a model of brevity and simplicity. There is a theory afloat that the American system of code practice was invented in New York, about the year 1848, but an examination of the Louisiana Code of Practice, will satisfy the reader that the greater share of credit, in this matter, belongs to its compilers, who were Edward Livingston, Pierre Derbigny and Moreau Lislet.

By an act of 1828, all the civil laws in force be-

fore the promulgation of the Codes with a single exception, were declared abrogated. It was decided, however, that the Roman, the Spanish and the French civil law, which the legislature thus repealed, were the positive written or statute laws of those nations and of Louisiana, and only such as were introductory of a new rule, and not those which were merely declaratory; and that the legislature did not intend to abrogate those principles of law which had been established or settled by the decision of the courts of justice.⁴ The result is that the Codes of Louisiana—which have been again amended in 1870 for the purpose chiefly of omitting matters rendered obsolete by the late war—are interpreted, when necessary, firstly, by the decisions of her courts, and secondly, in the absence of such, by the principles of the civil law, so far as they can be applied to the subject-matter and to modern life. No code of commerce or of evidence has ever been adopted in Louisiana, and it has been settled that in commercial matters we will follow the law merchant of England, and of the other states of the Union;⁵ and that in matters of evidence, we will be governed by English and American decisions, so far as not modified by statute or code.⁶ When it is remembered that in the federal courts we have the admiralty and chancery in full operation, it will be

⁴ Reynolds vs. Swain, 13 Louisiana Annual Reports, 193.

⁵ McDonough vs. Millandon, 5 Louisiana Annual Reports, 405.

⁶ Drauget vs. Prudhomme, 3 Louisiana Annual Reports, 86.

seen that the strata are numerous, which have been from time to time deposited in the legal alluvion which lies about the mouth of the Mississippi, and that a New Orleans lawyer may be expected to profess an acquaintance with a good many different things.

It will be noticed also, that during the lengthy period in which Martin sat on the bench, the questions which came up for decision were, for these reasons, of unusual difficulty and importance. For not only were the complications of colonial jurisprudence to be untangled, but in addition to these came the problems of the territorial government, of the Code of 1808, of the relations between the civil law and the American system, of the relations between the federal and state power, of the Constitution of 1812, and of the Code of 1825.

The Supreme Court of Louisiana, from 1821 to 1833, was certainly one of the ablest tribunals of last resort in the United States, and its decisions have been cited with respect to other countries. During the period here referred to, it was composed of George Matthews, François-Xavier Martin, and Alexander Porter.

From the death of Matthews in 1836, Martin was presiding judge. Judge Bullard, who was one of his associates, says, that in this position, "in his deportment towards the bar, he rarely, if ever, evinced anything like petulance or censoriousness, while at the same time, on every proper occasion, he uttered

rather the censure of the law than of the court upon such persons, whether parties or advocates, as merited reproof.⁷

This is a high compliment. It too often happens that a judge, in a spirit of impatience or vanity, treats with arrogance or even insolence the counsel or the parties who appear before him. It is said that Thurlow ruined the business and broke the heart of a deserving solicitor by an unjust attack upon him from the bench. Such conduct is most reprehensible, not only because it may inflict a wanton injury, but because the lawyer when thus attacked, is attacked with his hands tied, and cannot well respond in kind. A judge might, at least, if he happen to feel dyspeptic or truculent, remember the school boy rule to "take one of your size," and not assail those whom the law, for reasons of public policy merely, has placed, for the time being, in a defenseless position. We may be sure that Martin never violated the rules of an intelligent generosity in this regard.

Yet there are limits to human endurance, and on one occasion, as tradition relates, the massive patience of Martin gave way. He was growing old, and was in the habit sometimes of thinking aloud. A young lawyer, fresh from the Emerald Isle, was making his maiden speech before the court. It was a vile mass of rubbish and bombast. One of the associates whispered to his chief:

⁷ Louisiana Annual Reports, 8.

"I don't know what this young man means by all this ranting."

"He don't know himself," shouted Martin, "let him sit down—let the other lawyer speak."

And so the ambitious youth sat down.

When Martin published his *History of Louisiana*, in 1827, he seems to have considered himself an old man, because he was sixty-five. He says of himself, in the preface, what he probably would not have wished any one else to say:

Age has crept on the author, and the decay of his constitution has given more than one warning that if the sheets now committed to the press were longer withheld, the work would probably be a posthumous one.

Yet he was destined to labor for nineteen years longer. His imperfections of vision increased under his incessant and protracted work, and in 1838, he became quite blind. For all practical purposes, this blindness was total during the last eight years of his judicial life. Yet he continued to sit on the bench and to discharge the duties of his office with a regularity that was surprising. His last reported opinion was delivered in February, 1846, in which it was held that an inspector of elections, who has illegally and maliciously prevented one from voting, will be responsible to such person in damages.⁸

In the year 1844, Judge Martin made a brief visit to France in the hope of obtaining some relief for

⁸ *Bridge vs. Oakey*, 12 Robinson's Reports, 638.

his eyes—a hope which was entirely fruitless. Before his departure, he was entertained with a dinner, given to him by the New Orleans bar, at the City Hotel, at which a brief speech composed by him, was read by Judge Morphy.

In March, 1846, in consequence of the adoption of a new State Constitution, the court of which he was a member, ceased to exist, and he was thus retired from the bench. By reason of strength, his days had become four score and four, and there was little left for him to do in this world. For him, the pathetic question of the poet, "What can an old man do, but die?" was but a natural one. On the 10th of December, 1846, the end came. On the 12th, the usual proceedings were had in the Supreme Court. The deceased was buried in the St. Louis Cemetery, and a shaft of granite marks the grave. Its inscriptions were placed upon it by some of his friends of French descent, and briefly sum up the chronology of his life:

François-Xavier Martin: né à Marseille, 17 Mars, 1762, mort à la Nouvelle Orleans le 10 Decembre 1846. Membre de la chambre de l'état de la Caroline du Nord 1806. Juge de la Cour du Territoire du Mississippi 1809. Juge de la Cour Supérieure du Territoire d'Orleans 1810. Juge de la Cour Supreme de l'état de la Louisiane pendant 31 ans, du 1 Fevrier au 18 Mars 1846. Membre associé étranger de l'Academie de Marseille 1817. Docteur de l'Academie de Harvard 1841.

In personal appearance, Martin was rather below the medium height, with a large head, a Roman

nose, and a thick neck. As he further advanced in years and began to lose his eyesight, he became a somewhat uncouth, and to those who knew him, a pathetic figure. He never married. Some said he could not afford such an extravagance as a wife. Absorbed in the study of law and the practice of parsimony, it does not appear that the thought of domestic happiness ever entered his imagination, and much less his heart.

Lord Campbell relates the story of an English barrister, who, having been married one morning, and finding the day to hang heavily on his hands, went to his office and began to study an intricate case. He became so interested in his investigation that he studied all night, and not until the next morning did he remember that he had a bride at home. It is likely that Martin would have made a husband as little flattering and attentive as the hero of this anecdote. He was an inveterate recluse, and the presence of a wife would only have been annoying to him, and his habits would surely have annoyed her.

It is a matter of regret that his private life seems so cheerless, when compared with that of other men who have been great in his profession. It might be pleasant to record that, like Coke, he married in due time, and reared up ten children in the ways of wisdom; though, perhaps, the reader might also recall the additional fact that Coke tried matrimony a second time and had a termagant for his second spouse,

who led him a dreadful life. But yet, it would be agreeable if one could detail some romance of his early life, like that of John Scott, afterwards Lord Eldon, who, at the age of twenty, before he had begun to study law, and while romance was possible, fell in love with beautiful Bessy Surtees, eloped with her by the help of a real rope ladder, married her in Scotland, and strange to say never repented of the rash act, but loved her as well when she was sixty-three, and Countess of Eldon, as when she was Bessy, the belle of Newcastle.

We do not know in his life any such incident as that which occurred to Mansfield, when he cast the longing eyes of youth upon a young lady, whose father was not fond of young lawyers, but proceeded to marry her off to a booby squire with broad acres and broad face.

Nothing of the sort glistens in Martin's life. He seems to have needed no companion or consort. The truth is that he had the temperament and the habits of a miser. His frugality was innate, and his instinctive trait, developed by the struggles of his early poverty assumed proportions which might have furnished a subject for the pen of Molière, or a supplemental scene for *Les Cloches de Corneville*. His painful economy in North Carolina enabled him to bring to New Orleans a considerable sum. From that time, he received an average salary of about five thousand dollars a year, besides the proceeds of his reports and other books. He lived, so

to speak, on nothing, and heaped up his savings with compound interest.

Some years before his death, the judge sent for a brother, who came over from France and took up his abode in New Orleans. This brother, Paul Barthelemy Martin, was somewhat younger, though between sixty and seventy years of age. But he was a younger brother still to the imagination of the judge, who always called him by the affectionate diminutive of Mimi. Mimi was not so excessively frugal, and tried to introduce a little comfort into the home of the chief-justice, and even went so far as to insist upon having some decent table claret to enliven the dinner. It goes without saying that the judge groaned in spirit at such wild extravagance as wine at twenty-five dollars the cask, but Mimi carried his point.

Judge Martin's will was written in 1844, in the olographic form, on a half sheet of coarse foolscap, as follows:

I institute my brother, Paul Barthelemy Martin, heir to my whole estate, real and personal, and my testamentary executor and detainer of my estate. In case of his death, absence or disability, I name my friend and colleague, Edward Simon, my testamentary executor and detainer of my estate. New Orleans, this twenty-first day of May, eighteen hundred and forty-four.

F. X. MARTIN.

It would seem that a man who had been profoundly versed in law for some sixty years, might make a will no one would dispute; and that after

having himself been advocate or judge in so many lawsuits, his bones might rest undisturbed by any din of forensic warfare over his grave.

If he had died in poverty, as many good lawyers and judges have done, the result might have been different from what it proved to be; but he died rich. His estate was inventoried at \$396,841.17, and it is likely that its full value was about a half million.

The will above copied was proved and ordered to be executed, and Paul B. Martin entered into possession of the estate. A few weeks after, the state of Louisiana commenced its suit against him, alleging that he had caused himself to be recognized as executor under a pretended olographic will of François Xavier Martin, dated 21st May, 1844, and had taken possession of his estate. That the said pretended olographic will was void and of no effect, for this, that when it was made, François Xavier Martin was physically incapable, on account of blindness, of making an olographic will. That the estate of the deceased (who on this theory died intestate) fell to heirs domiciliated out of the United States, viz: in France, and was, therefore, subject to a tax of ten per cent. by the Statute of 1842; and the state, therefore, demanded judgment for this tax amounting to the sum of \$39,684.11. The state by a supplemental petition further alleged, that for the illegal purpose of depriving the state of this ten per cent., the deceased had bequeathed all his property

to his brother, P. B. Martin, a resident of New Orleans, with a secret understanding and agreement that he, Paul, was to hold it as a resident, and so evade the state tax on estates going to non-residents, and yet, that eventually the property should go to these non-resident relatives in France; that this agreement, and the will made in view of it, were illegal and contrary to public policy and order, and therefore void.

In short, the state claimed two things:

1. That the will was void as a legal and physical impossibility.

2. If it was not void for these reasons, it was void as an attempted fraud on the fiscal rights of the state.

The suit was defended and the court below gave judgment in favor of the state, but the defendant appealed, and the questions, both of fact and law, came up before the Supreme Court at the June term, 1847, in the tribunal where Judge Martin had presided so long.

A great deal of testimony had been taken; and among other witnesses, Judge Bullard, who had been long associate on the bench with the deceased, had been called. He stated that Judge Martin wrote an opinion in 1834, at Baton Rouge, at which time his sight was quite dim, and he wrote farther than the paper on the table, so that when the clerk came to examine the opinion, a part was on paper and a part written on the table. That since 1836, he had never seen him write more than to sign his

name. That it was necessary in all cases where he had to sign his name, to place a pen in his hand and direct him where to sign. It was not necessary to hold his hand. He sometimes signed his name well. He could not tell if he had ink in his pen or not. He could not read what he had written, nor had he read anything since 1836, or at latest, since 1838. Being shown the will of Judge Martin, witness said the testator could not have read it; he was totally blind in 1844, when he went to France on a visit; but it is written in his handwriting; believes the testator could have written the will by means of bars to confine the edges of the paper, or other mechanical means, or by feeling the edges, but thinks he required the assistance to take his pen, and get the ink. Witness was present when the will was opened. It was folded in the form of a letter. Thinks that the testator could have folded the will by feeling, but does not know about the sealing. The testator told witness on one or two occasions, when they had cases before them growing out of this ten per cent. tax, that it might be easily evaded. Has no recollection of Judge Martin's ever having revealed to him the manner in which it might be evaded, nor does he believe Judge Martin had the intention of evading it himself.

The defendant, Paul Martin, was interrogated in regard to the alleged fraudulent agreement, as to the eventual disposition of the property, and in rather acidulated French, denied it flatly. Being

asked if his intention was not to give the property to the other heirs of Judge Martin, he replied:

Je n'ai la dessus d'autre intention que celle de disposer de ma fortune selon ma volonté. La dessus je dis que ne me crois pas obligé de faire dans ce moment un testament public. Je ferai mon testament comme je l'entendrai.

The case was elaborately argued by Mr. Attorney-General Elmore, assisted by Mr. Musson and Mr. Pepin, for the state, and by Mr. Grima, Mr. Mazureau, and Mr. Legardeur, for the defendant.

The use of French in court was common, even at that late day, and Mr. Mazureau's brief, published in the report of the case,⁹ is written entirely in this language. Its introduction is worth translating, though of course, a translation cannot present the vivacity of the original. He says:

He who amasses a great fortune sows the seeds of a great lawsuit, which germinate after his death. This apothegm of an Indian Philosopher, if I am not deceived, has never prevented some men, in every country of the civilized world, from piling up during all the days of their life, riches which they knew how to enjoy but in one way, in looking at them.

But experience has often proved that the saying is correct, and the present action is an example of its truth.

François Xavier Martin, the architect of his own fortune, arriving in his youth in the United States, was one of those men not often met with now-a-days, to whom study, obstinate toil, and the constant exercise of the thinking faculty were prime necessities of life. Two passions appeared to rule him: that of fame as a savant and jurist, and that of riches. His external life was in some sort

⁹ State vs. Martin, 2 Louisiana Annual Reports, 667.

that of a philosopher dwelling apart from all mundane vanities. And, in his interior life, almost always alone with himself, he developed with peculiar wisdom the resources which his own talent created for him, whether to enlarge his reputation as a lawyer and a magistrate, or to augment the cash which he had laid up by his toil and his economy. . . . For thirty years his ear was caressed by the most flattering testimonials of a high consideration, both as a savant, and as a judge of integrity and purity. He has descended to the tomb, escorted by a numerous procession composed of all that our city contains of respectability. But in giving up his mortal part to the earth, our common mother, he has left a will, by which he disposes, in favor of his brother, of a fortune of nearly \$400,000. And this judge, this president of our Supreme Court, celebrated for his intellectual capacities, and his distinguished judicial mind, who has been able for thirty years, during nine or ten of which he had lost his sight, to write out and pronounce decisions which many considered as oracles, has not been able to escape the severity of the sentence of the Hindoo philosopher. His death has given life to a lawsuit; and in this suit, brought in the name of the State, he is represented as incapable of making an olographic testament, and its annulment is demanded. A supplemental petition is presented, in which we recognize manifestly that this illegal incapacity springs only from an imagination burning to obtain at least some scrap of this opulent succession, and, in which, wishing to arrive more surely at this goal, they accuse him of having made by his will a trust prohibited by our Code.

Mr. Mazureau proceeds at great length to argue the questions presented, and the counsel on both sides ransacked the history of the legal world, from the time of the Roman law down. There was some plausibility, at first sight, in the theory that a blind man could not make an olographic will. To be such

a will, it must be dated, written, and signed, entirely by the testator; it was not necessary that it should be witnessed, and it was not; and could it be said that a blind man, who could not read what he had written, who could not tell whether he had ink in his pen or not, who could not be supposed to know, of himself, whether his intentions had been correctly expressed, be able to write a will of this sort, which would, by itself, satisfy the requirements of a will; that is, make proof that the dispositions it contained, emanated from the testator, and embodied all his intentions?

But the Supreme Court decided in the first place that the will was valid, it being clearly proven that it was dated, written and signed by the testator, that if he made use of mechanical contrivances, to assist him, they could be considered only as "helps to write," in the nature, for example, of spectacles; that such helps would not deceive him as an amanuensis might deceive a blind man, and that the document must be presumed, in the absence of clear proof to the contrary, to express the intentions of the testator.

Upon the second point, the Court found, as matter of fact, that the venerable man had not been guilty of violating the laws he had so long labored to expound and to perfect. They found that the relatives, in whose favor he was accused of having made secret dispositions, were persons with whom he was really unacquainted, and they inquired, through their organ, Judge Rost, who delivered the opinion:

Upon what principle of human action can it be explained that a man of great intellect, occupying the highest judicial position of the State, known to us all from our youth as having been a law unto himself, and who, whatever may have been his oddities and faults, justly prided himself on the purity of his life, should have died perpetrating a vile fraud for the benefit of relatives unknown to him?

.

There is another view, far more consistent with his character. The love of independence was a passion with him, and the things of this earth, by which independence is secured, had a large share in his affections. His desire that his worldly goods should be kept together after his death, exhibited by the pain he felt at the mere suspicion that his brother would sell them and leave the country, far out-weighed in his mind his attachment for those persons. We believe in the sincerity of his anguish. The last looks of the man of wealth, dying without posterity, are cast upon the property he has amassed; his last hope on earth is, that his estate may live and continue to represent him. The defendant in this case (the brother), was the instrument selected to give life to that cherished fiction. We have no doubt of his being really universal legatee, nor that the intentions of the testator were, as he expressed them, that his brother should continue to be, in all respects, *un autre lui-même*.

..

The representative of the State has faithfully discharged what, under the information he had received, he conceived to be an official duty. On us devolves the more grateful task, to determine that he was misled by that information, and that the name of François-Xavier Martin stands unsullied by fraud.

It is ordered, that the judgment rendered in this case, in favor of the State, be reversed, and that there be judgment for the defendant.

And so terminated this singular suit. It may be added, as a pleasant fact, that at the death of Paul

Barthelemy Martin, the bulk of the estate went to a niece, who is still, it is believed, living in southern France, and by reason of her character, is known as the Providence of the community where she resides. Such a result may, perhaps, justify the painful economies of the venerable judge.

To the American lawyer, the main question now presented by the life of such a man as Martin concerns his influence on the development of jurisprudence in our country. It is not given to many lawyers to have such an extended career, and such a varied experience. At once a Frenchman and an American, a master of both the common and the civil law, and a keen student of legal history, he had, for his time, an unusual equipment for assisting in the work of developing jurisprudence, and an unusually protracted period for such work. His professional life might be said to have begun practically with the existence of the United States under its present Constitution, and lasted until almost the middle of the nineteenth century. He had an instinct for history and classification, and from the beginning of his career was zealous in noting, reporting and publishing the decisions of the courts, although such work must have added enormously to his labors.

A reference to a few leading opinions delivered or concurred in by Martin during his long judicial career, will show the curious questions presented before him, and their effect in some cases on the development of American law.

In *Hudson vs. Grieve*,¹⁰ the question was whether a parish or county judge could appear as counsel in the case, and it was held that he could not. The laws of the territory were passed and promulgated in both French and English, and each version was adjudged to be of equal validity. By the French text, though not by the English version, the parish judge was excluded from such practice, and it was held that this prohibition must have the same effect as if it had been in both originals.

The case of *Deturnion vs. Dormenon*, in the same volume,¹¹ comes near being humorous. Dormenon was a parish judge at a time when, as a matter of convenience, in the country, the parish judge was authorized to act *ex-officio* as a sheriff in the sale of certain property. While he was selling at auction, he conceived himself insulted by Deturnion, and imposed a summary sentence of fine and imprisonment. Deturnion paid the fine and brought the suit for damages, and the court held that he should have judgment. Martin was then a member of the court and reported the case. The legend of this controversy still lingers in the parish where it occurred, and after the lapse of nearly a century has taken the following form: A parish judge was selling property at auction, when one of the crowd said something irreverent. The judge threatened him with punishment for contempt. He replied that he did

¹⁰ 1 Martin's Louisiana Reports, 143.

¹¹ 1 Martin's Louisiana Reports, 137.

not think there was such a thing as contempt of an auction or an auctioneer. "Never mind," shouted the excited and irascible judge, "I will have you to know that I am an object of contempt at all times and in all places."

The case of *Denis vs. Leclerc*,¹² in which Judge Martin rendered the opinion, is interesting as a study in comparative jurisprudence. It was claimed that the defendant, having by improper means obtained a letter written by the plaintiff to a third person, was preparing to publish it with an indecent commentary. A temporary injunction as to the letter was granted; and thereupon the defendant filed an answer, annexing a copy of the letter, and published an advertisement inviting the public to go to the clerk's office and read the copy, or to come to defendant's printing office where another copy was posted up for inspection. Judge Martin discussed the questions involved at some length, and with references to the laws of Rome, France, England and the United States. He held that under all these systems the writer of a letter has a certain property in it; that this property continues after the person to whom it is addressed has received it; that the right of publishing it remains in the writer, unless abandoned; and that the right may be violated by multiplying copies, or using the letter contrary to the presumed intention of the writer. It was further held that the defendant was in contempt of the

¹² 1 Martin's Louisiana Reports, 297.

injunction, and he was punished by fine and imprisonment.

The case of *Keene vs. Lizardi*,¹³ decided in 1835, was an action for damages against the owners of a vessel for injury done to the plaintiff and his wife by the torturous conduct and outrageous and indecent treatment of them by the captain and pilot of the vessel, on a voyage from Vera Cruz to New Orleans. The plaintiff claimed \$100,000 damages, and obtained a verdict for \$100. His principal contention in the appellate court was that the defendant, the owner of the vessel, could be held responsible in exemplary and punitive damages for the misconduct of the captain and pilot, although it did not appear that the owner had ever authorized or ratified the conduct complained of. Judge Martin, in delivering an opinion affirming the judgment, said:

It is true, juries sometimes very properly give what is called smart money. They are often warranted in giving vindictive damages as a punishment inflicted for outrageous conduct; but this is only justifiable in an action against the wrong doer, and not against persons who, on account of their relation to the offender, are only consequentially liable for his acts, as the principal is responsible for the acts of his factor or agent.

Some American courts have clouded the question, and have failed to see the point so well expressed by Judge Martin. The Supreme Court of the United States, however, in 1893, set the question at rest, so far as Federal tribunals are concerned, quoting

¹³ 8 Louisiana Annual Reports, 297.

Judge Martin's opinion, among others, and holding that a railroad corporation is not liable in exemplary or punitive damages for an illegal, wanton or oppressive arrest of a passenger by a conductor of one of its trains, which it has in no way authorized or ratified.¹⁴

There was an important line of decisions in the Supreme Court of Louisiana while Martin was on the bench, in which he took part in consultation and concurrence, but in which the opinions as a rule were delivered by his brilliant associate, Alexander Porter, an Irish scholar remarkable for gifts and graces. These cases concerned questions in the conflict of laws, and naturally arose in a place like the New Orleans of that day, where people were flocking from all parts of the world to engage in trade and speculation; and where commerce was mainly concerned with business coming from other states and countries. Contests over points in private and international law were plentiful, and the decisions of the court as cited in the works of Story and others, have been referred to with much respect. The case of *Saul vs. His Creditors*¹⁵ is prominent among these authorities,—a case which is the foundation of the harmless jest that Louisiana is the only state where a man sues his creditors. It was a proceeding in insolvency, logical enough in form and style, in which the plaintiff called in his creditors

¹⁴ *Lake Shore &c. Co. vs. Prentice*, 147 United States Reports, 101.

¹⁵ 5 Martin's Louisiana Reports (new series), 569.

to accept a surrender of his property and vote on the question of a discharge, under a statute the theory of which dates back to the time of Julius Cæsar. A number of important questions were discussed in the case. It was held that subsequent statutes do not repeal previous ones by simply containing different provisions; but in order to effect an appeal the provisions must be contrary. It was further held that at the time (1827) the jurisprudence of Spain formed a part of the law of Louisiana, no statute to the contrary having as yet been adopted. It was held that where the personal statute of the domicile is in opposition to a real statute of the *situs*, the real statute will prevail. It was held that contracts are governed by the laws of the country where they are made, but cannot be enforced to the injury of a state whose aid is required to carry them into effect, nor where they are in opposition to the positive laws of that state; and that in the conflict of laws, where it is doubtful which should prevail, the court or the forum should prefer the law of its own country to that of a stranger. It was further held that the law of Louisiana relating to the matrimonial community of *acquêts* and gains was a real, and not a personal statute, and governs marriages made in other countries when the parties come to reside in Louisiana, as to all property acquired after their arrival in the state. Saul and his wife were married in the state of Virginia in 1794, but in the year 1804, removed to the territory that afterwards became the state of

Louisiana; fixed their residence and domicile in Louisiana, and continued to reside there until the year 1819, when the wife died. The children claimed one-half of the property acquired in Louisiana as community property, while the other side contended that, as the marriage took place in Virginia, where there was no law of community, the whole of the property laid up in Louisiana belonged to the estate of the husband. The court decided that, as to the property acquired in Louisiana, the community existed, and that the contention of the children must be sustained.

The case of *Breedlove vs. Turner*¹⁶ involved some interesting points which arose when many questions of law were as yet unsettled in the new state. The plaintiff sought to hold the defendant responsible as attorney and counsellor at law, in a large amount, by reason of his unskilfulness, mismanagement and gross neglect in an attachment suit he had brought on their behalf. The principal charge against defendant was that he had brought the attachment in a tribunal which under a recent decision of the Supreme Court had been held to have no jurisdiction, and so the plaintiffs lost their claim. Many unusual points were made on behalf of the defendant; as that the decision of the Supreme Court was wrong; that lawyers in Louisiana were not under obligation to notice decisions of that court; that where there was a doubt as to jurisdiction the ques-

¹⁶ 9 Martin's Louisiana Reports, 353.

tion, as in Spain, should be referred to the legislature; that the defendant was a counsellor as well as an attorney, and as an attorney was protected by his own advice as counsel; and that the defendant had not in the sense of the law committed any fault or neglect. These points were all examined with great patience and overruled; but the defendant lawyer escaped after all, the court holding that at the time the attachment suit was begun, the decision that the tribunal when it was instituted had no jurisdiction, had not yet been published, and moreover the special facts depriving that tribunal of jurisdiction did not appear by legal evidence.

The court had occasion at various times to discuss questions of personal freedom, and to express its views in favor of liberty. In *Merry vs. Chexnaider*, decided in 1830,¹⁷ the entire opinion, which disposes of questions which were afterwards considered difficult, is as follows:

The plaintiff sues, in this action, to recover his freedom, and from the evidence on record, is clearly entitled to it. He was born in the northwestern territory, since the enactment of congress, in 1787, of the ordinance for the government of that country, according to the 6th article of which, there could be therein, neither slavery nor involuntary servitude. This ordinance fixed forever, the character of the population in the region over which it extended, and takes away all foundation from the claim set up in this instance, by the defendant. The act of cession by Virginia, did not deprive congress of the power to make such a regulation.

¹⁷ 8 Martin's Louisiana Reports (new series), 699.

In *Marie Louise vs. Marot*,¹⁸ where it was claimed that a mulatto woman had become free because she had been taken by her owner to France for temporary residence, the opinion declared:

The main question in the cause, as it now stands before the court, is whether the fact of her having been taken to that kingdom by her owners, where slavery or involuntary servitude is not tolerated, operated on the condition of the slave, so as to produce an immediate emancipation. That such is the benign and liberal effect of the laws and customs of that State, is proven by two witnesses of unimpeached credibility. This fact was submitted to the consideration of the last jury, who tried the cause under a charge of the judge, which we consider to be correct, and was found in favor of the party whose liberty is claimed. Being free for one moment in France, it was not in the power of her former owner to reduce her again to slavery.

In *Livaudais vs. Municipality*,¹⁹ the question was whether the plaintiff in a *petitory* action had divested himself of title to the property he claimed by a dedication thereof to public use. He had laid out certain land into lots and squares, and on the plan had marked the square in controversy "Colysée," and it was claimed that this amounted to a dedication of this parcel to a public use, rendering it a public place and out of commerce. The court pointed out that the Coliseum of Rome was originally the private property of the Emperor, and there was no evidence that its character was ever changed; that the act of the plaintiff in marking the square in

¹⁸ 9 Louisiana Annual Reports, 475.

¹⁹ 16 Louisiana Annual Reports, 509.

question with the word "Colysée" was not in itself a dedication to public use; that whatever obligation might rest on him to erect such a building, no demand had ever been made on him by any one having any right to make such demand; and that the judgment in favor of plaintiff must be affirmed.

A decision rendered by Judge Martin in *Thayer vs. Littlejohn*²⁰ presents some facts which occurred near the Texas border. The statement of the case in the opinion is as follows:

The plaintiff, tenant of a log house, was absent from home, when the defendant, Littlejohn, accompanied by his four co-defendants, came to execute a frontier process for rent arrear. They began, by carefully putting out of doors, the table, chairs, and the rest of the furniture; and afterwards led out of the house the wife and two children of the plaintiff, the only persons therein; and finally, took out a box, which laid in a corner of the house, in which a feathered animal was rendering the first maternal duties to her future progeny. They did so with so much care, that she was not at all disturbed; and none of the frail shells, which enclosed the unborn brood, came in such contact with the sides of the box or with each other, as to occasion a premature birth. The defendant next unroofed the house, and took down so many of the logs as to render it uninhabitable. The plaintiff sought relief in the district court by the present suit. The defendants pleaded the general issue. There was a verdict against them for three hundred dollars. They made an unsuccessful attempt to obtain a new trial, and the present defendant has appealed. The facts were clearly proved. Evidence was admitted without opposition, to establish that the plaintiff is a man of bad character, addicted to hard drinking and not a very strict observer of one of the ten commandments.

²⁰ 1 Robinson's Louisiana Reports, 140.

But the court held that this "frontier process" was highly illegal and in affirming the judgment thanked the jury for their verdict.

The case of *Duke of Richmond vs. Milne's Executors*,²¹ is characteristic. Alexander Milne had come over from Scotland and made a fortune in New Orleans; and by his will he bequeathed \$100,000 to his native town of Fochabers, to be employed in establishing a free school. The rest of the estate was left to asylums in his adopted city. The plaintiffs, who claimed the legacy of \$100,000, were Charles Gordon, Duke of Richmond and Lenox, superior and feudal lord of the burgh of barony and town of Fochabers, in the County of Moray, Scotland, and Alexander Marquis, baron, baillie and sole magistrate appointed by the Duke for the administration of justice in the town of Fochabers. The defense raised two leading points: (1) that the town of Fochabers was not incorporated, and the plaintiffs were therefore without capacity to take; and (2) that the legacy could not be enforced because the laws of Scotland prohibited similar dispositions in favor of a citizen of Louisiana. The law of Louisiana under such circumstances forbade a disposition in favor of a citizen of Scotland. The opinions of Lord Advocate Rutherford and Solicitor-General Maitland were taken as to the law of Scotland. The court decided both questions in favor of plaintiffs, holding that the town of Focha-

²¹ 17 Louisiana Annual Reports, 312.

bers was incorporated as a burgh of barony in 1598, and was duly represented by plaintiffs; and that while the law of Scotland forbade a devise of "a heritage" to an alien, it did not forbid a bequest of money to such a person, and so the law of Louisiana would sanction such a gift.

In addition to these illustrative cases, reference may be made to the adoption by the court during Martin's time of important principles of jurisprudence tending to align Louisiana with other states of our country. As remarked above, no code of commerce, like that of France, was ever adopted in Louisiana, and the court very wisely held that, under the circumstances it would follow the general provisions of the law merchant of England and the other states of the Union. On the same principles it was held that in matters of evidence, unless otherwise provided by specific statute, the general rules followed in the other states would be followed in Louisiana. The common law jury had been adopted in criminal cases, and in almost all civil cases where a party chose to ask for it; and it was but natural that the system of evidence which grew up around the institution of trial by jury, should also be followed in Louisiana.

It would be easy to cite other illustrations of the work done by Judge Martin under circumstances of peculiar difficulty and importance. There can be no doubt that by reason of wide experience and long service, his name is entitled to take high rank in the

list of great jurists in America; in that list which includes such names as Shaw, Kent, Gibson and Marshall. He has been called the Mansfield of the Southwest, but such comparisons are of little value. They are always defective, and sometimes very deceptive. In many respects Mansfield and Martin were entirely unlike. Yet, from one point of view at least, their work was similar. In the department of what may be called constructive jurisprudence, in the skilful blending of the best principles of the English and the Roman law, in the apt illustration of one by the other, a resemblance may be traced.

JAMES GOULD

JAMES GOULD.

From an oil painting on glass (artist unknown), in possession of G. Glen Gould, Esq., of New York City.



JAMES GOULD.

1770-1838.

BY

SIMEON E. BALDWIN, LL.D.,

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Yale University.*

OF American lawyers who have made the teaching of law the main work of their lives, James Gould was the first in point of time.

Tapping Reeve, a graduate of Princeton in the class of 1763 and afterwards for three years a tutor there, became a practicing lawyer in Litchfield, Connecticut, in 1772. He had the kind of temperament which is not inaptly styled magnetic. Law students sought his help and so filled his office that in 1782 he found himself conducting what was really, in the fullest sense a Law School, and giving set lectures to established classes.¹ It was the first that was set up in America;² nor indeed did any other then exist in any English speaking country, for the Inns of Court had long ceased to be seats of serious instruction and the "schools" of Oxford and Cambridge were little but a form.

¹ Lyman Beecher, sermon at the funeral of Honorable Tapping Reeve, Litchfield, 1827, p. 10.

² Baldwin, *The American Judiciary*, p. 350.

More than two hundred men had been educated under Mr. Reeve when, in 1798, he was appointed a judge of the Superior Court. His duties as such necessarily required his absence from home for a considerable portion of the year. One of those whom he could call his alumni was a young graduate of Yale who entered the Litchfield school in 1795, and had recently been admitted to the bar of Litchfield County. This was James Gould, and Judge Reeve selected him as his associate and successor in the work of legal education.

Mr. Gould was born in Branford, Connecticut, a village lying on Long Island Sound near New Haven, December 5, 1770. His great-grandfather, Richard Gould, coming from Devonshire, in England, at the beginning of that century, had settled in this place, and there he and his son and grandson after him,³ successively practiced medicine. The latter, William Gould, was one of the founders of the Medical Society of New Haven County in 1784, and was put at the head of its first committee for the examination of students.

James Gould inherited a love of learning from this line of ancestry. He was also unlucky enough to inherit the gout. This attacked his eyes in boyhood, and while in college he was seldom able to use them to read the lessons assigned for study. They were generally read aloud to him by classmates; but notwithstanding this disadvantage, he

³ Papers of the New Haven Colony Historical Society, vol. II, 332.

went through the regular course at Yale with distinction, and at his graduation in 1791 delivered the salutatory oration, then the honor awarded to the first scholar in the Senior class. He taught school a year or two, first at Wethersfield, Connecticut, and then in Baltimore, Maryland, and early in 1793 commenced the study of law with Judge Charles Chauncey of New Haven, although still unable to use his eyes for more than fifteen minutes at a time in steady reading. Judge Chauncey, a descendant of President Chauncey of Harvard, was a man of high attainments and wide scholarship. Before going upon the bench he had had the largest professional practice in the county. There is a tradition that he had at one time over a thousand cases on the docket. Most of them no doubt were attachments of the body for debt, a form of proceeding which has probably been well replaced in our times by the collection agencies. He commonly had several students in his office and gave them a formal course of lectures on jurisprudence.⁴

In September, 1793, Mr. Gould was appointed a tutor at Yale and occupied that office during the next eighteen months. On July 4, 1795, he delivered the annual oration at New Haven before the Connecticut Society of the Cincinnati. This he repeated three years later, with some additions, on the same anniversary, before the citizens of Litchfield, at whose request it was printed by the village press in pam-

4 Papers of the New Haven Colony Historical Society, vol. I, 129.

phlet form. It denounced the excesses of the French Revolution and strongly reflected the general political views of the Federalist party, of which he was an adherent through life.⁵

The necessity of learning through the ear had been in some measure a blessing in disguise, by forcing him to habits of fixed attention and concentrated thought. With their aid he was now enabled to complete his legal education under Judge Reeve, and he then decided to remain in Litchfield and make it his future home.

The offer to participate in the work of conducting the Law School must have been a welcome one to the young lawyer, still shivering on the brink of an uncertain future. It assured pecuniary independence, and at that period the business of the country was under a heavy cloud in consequence of our strained relations with both France and Great Britain. The bar of Connecticut, too, had begun to suffer from the existence of the Litchfield Law School as well as to profit by it. As the seat of the only American Law School it was easier for her citizens to get a legal education, than for those of any other state. The natural consequences followed. Many of her sons became lawyers who, had it involved a larger cost, would have been unable to meet the outlay. This condition of things had existed for

⁵ Judge Reeve was an ardent Federalist and, while on the bench, used such strong language in regard to President Jefferson that he was indicted by the grand jury for libel under the Sedition Act. Jefferson did not approve of the prosecution, and had a *nolle* entered.

some time before Mr. Gould's admission to the bar, and is thus described by Jeremiah Mason, as it appeared to him in the fall of 1789, while a law student of New Haven: ⁶

The war of the Revolution had exhausted all the resources of the country. For the want of an efficient National government, trade and all other kinds of business remained stagnant. The profession of the law felt this depression severely. The State of Connecticut was overstocked with lawyers; most of them had but little business, with fees and compensation miserably small. The professional income of Pierpont Edwards, supposed to be the largest in the State, was said not to amount to two thousand dollars a year. Very few obtained half that sum and my master Baldwin, with his utmost diligence, was scarcely able to maintain his small family, living in the most simple manner. Seeing the host of needy young lawyers, some with clear talents, seeking business with little or no success, I soon became satisfied that my prospect was exceedingly unpromising. The common opinion was that the prospect for success was much better in the neighboring States.

In 1798 there were about a hundred and twenty practicing lawyers in Connecticut. Jedediah Morse had observed in his "American Universal Geography," published a couple of years before, that while most of them found employment and support, it was really because the people of the state were of a peculiarly litigious spirit, and "remarkably fond of having all their disputes, even those of the most trivial kind, settled *according to law*." ⁷ The population of the state, however, was then over 250,000,

⁶ Life of Jeremiah Mason, p. 17.

⁷ Vol. I, 453, 463.

and measured by the proportion now existing between the lawyers and the inhabitants in most of our states, the Connecticut bar of 1798 would not seem excessively crowded. According to the present ratio for the entire United States, it should have been three times as large. The wealth of the state and of the country, however, have increased since the eighteenth century in far greater proportion than the population, and the business of the courts has multiplied accordingly.

The rules of court, at this time, in Connecticut, required as a condition of admission to examination for admission to the bar, two years of study with a practicing lawyer in the state, by those who had been graduated at a college, and three years by all who had not been.

The subjects of study differed greatly in different parts of the state. In New Haven each applicant for admission was required to submit a written thesis as well as to pass an examination. President Stiles has preserved a statement of the preparation for the bar made by his son, Ezra Stiles, Jr., who was admitted to the bar in that town from Judge Chauncey's office, in April, 1780. He had studied law for two years and a half, reading through forty volumes, of which ten were folios. Among these were Blackstone, Bacon's Abridgment, the Institutes of Justinian, Montesquieu's *Esprit des Lois*, Puffendorf, and two volumes of Burrow's Reports. He had also gone over part of the Pandects and could

read any part of them with ease. His thesis was on the "Laws of Succession to Estates."⁸

Nothing of Roman Law was taught at the Litchfield School. The courses were planned without special reference to the practice in any particular state. Three-fourths of the students did not come from Connecticut and of those who did, many were looking forward to settling for life elsewhere.

When Mr. Gould began to teach in the Law School in 1798, it numbered about forty pupils.⁹ Up to that time no catalogue of attendance had been preserved. He at once began to keep one, and the published catalogues of the school date from his accession.

He brought to his new work a keen intellect, a methodic habit of mind, great powers of discrimination, and the faculty of expressing his thoughts both clearly and effectively. In more than one respect he was a fitting complement to Judge Reeve. Reeve sometimes rose to eloquence, but often was careless and even commonplace in public address. He could waste words. To Gould this was impossible. From his first entrance to the bar he had begun to display qualities thus described by one of his fellow townsmen, as characterizing him in later life:¹⁰

As a lawyer, Judge Gould was one of the most profoundly philosophical of that age. He carried into the forum the same

⁸ Stiles, *Literary Diary*, vol. II, 418, 420.

⁹ Dwight's, *Travels in New England and New York*, vol. II, 373.

¹⁰ Hollister, *History of Connecticut*, vol. II, 602, 603.

classical finish which appears upon every page of his writings. It would have been as impossible for him to speak an ungrammatical sentence, use an inelegant expression, or make an awkward gesture, in addressing an argument to a jury, as it would have been for him to attempt to expound the law when he was himself ignorant of it, to speak disrespectfully to the judge upon the bench, or to exhibit any want of courtesy to the humblest member of the profession who might happen to appear as his opponent. His arguments also, like his writings, were expressed in the most brief forms in which a speaker can convey his thoughts to his hearers. He seldom spoke longer than half an hour, and in the most complex and important cases never exceeded an hour. He had the rare faculty of seizing upon the strong points of a case and presenting them with such force as to rivet the attention of the jury and carry conviction to their minds. Like a skillful archer, he could shoot a whole quiver of shafts within the circle of the target with such certainty and force that they could all be found and counted when the contest was over.

The two men respectively represent in a striking manner colonial and post-revolutionary thought. The elder, Reeve, was identified with the thought of the eighteenth century in Puritan New England. He was a theologian of the school of Jonathan Edwards, a granddaughter of whom was his wife. Gould, belonging to the next generation, was looking forward into the nineteenth century for his philosophy of life and death. Dr. Lyman Beecher, a Calvinist of the old school, was the pastor of the Litchfield Congregational church from 1810 to 1815, and his daughter, Miss Catherine E. Beecher, a woman of considerable literary power, gives a flash-light picture of this side of Judge Gould's

character in a contribution to her father's autobiography.¹¹

He was, she writes, referring to Judge Gould, of fine personal appearance, polished manners, extensive acquaintance with the English classics, and in all matters of rhetorical or verbal criticism his word was law. His wife was in no way inferior to him in general information and brilliant conversational powers. The judge was fond of disputing with father, in a good-natured way, the various points of orthodoxy handled in his discourses, particularly the doctrine of total depravity. And in a letter written during the last war,¹² when party feeling ran high—the Democrats for and the Federalists against French influence—he sent a humorous message: ‘Tell Mr. Beecher I am improving in orthodoxy. I have got so far as this, that I believe in the total depravity of the whole French nation.’

Even Reeve, however, was evidently but a half believer in total depravity. The story is told of him that he once said “that he never saw a little girl but he wished to kiss her, for if she was not good she would be; and he never saw a little boy but he wished to whip him, for if he was not bad he would be.”¹³

It was feeling that predominated and ruled the character in Reeve, and intellect in Gould. Their students respected both, but they loved only one. The commonplace book of a girl who was at Miss Pierce's School in 1811 shows entries by each. Judge Reeve describes her affectionately as “my

¹¹ Autobiography and Correspondence of Lyman Beecher, vol. I, 223.

¹² The War of 1812.

¹³ Autobiography and Correspondence of Lyman Beecher, vol. I, 225.

Lucy," quotes a verse from a hymn, and urges upon her attention the subject of personal religion. Judge Gould gives a few lines from Pope's *Iliad*.¹⁴

Litchfield, when Mr. Gould entered the bar and throughout his life, was one of the most considerable towns in the state in point both of population and of wealth. It was approached by several good turnpike roads, and soon after his coming they were traveled by daily mail stages to Albany, Poughkeepsie, Norwalk, and New Haven. There was a weekly newspaper, and a printing office, from which one book of permanent importance had already been put out,—Kirby's Reports, the first volume of law reports issued in the United States.

The central portion of the town, where Mr. Gould lived, was a small piece of table land on the summit of a commanding hill. The streets were broad and well-shaded; the houses spacious and surrounded by pleasant gardens; and the whole aspect of the place especially attractive. It is now a favorite summer resort. In 1818, it was incorporated as a separate "village" and given considerable powers of local government.

Mr. Gould was a remarkably handsome young man of elegant figure and graceful manners. He was a favorite in social circles, and soon became engaged to a spirited and beautiful young girl. His connection with the management of the Law School was quickly followed by their marriage, which oc-

¹⁴ Vanderpoel, *Reminiscences*, p. 57.

curred in 1798, when she was not quite sixteen. Mrs. Gould was one of four daughters of General Uriah Tracy, each of whom married a judge. Theron Metcalf of the Supreme Judicial Court of Massachusetts was the husband of one. A sister of Mr. Gould was also married to Roger Minott Sherman, the first advocate of his day in Connecticut, who afterwards became an associate-justice of the Supreme Court of Errors of that state.

Mr. Tracy in 1798 was at the head of the Litchfield County bar, and represented Connecticut in the senate of the United States. He was a man of marked ability, with a mind both alert and well equipped. One of his ready repartees has secured an established place among American political anecdotes. As he was chatting one day on the steps of the capitol at Washington with John Randolph of Roanoke, a drove of asses passed on its way to the Long Bridge. "There," said Randolph, who remembered that asses were extensively bred in Connecticut for exportation, "go some of your constituents." "Yes," replied Tracy, "they are going to be schoolmasters in Virginia."

Mrs. Gould inherited both her father's vivacity and his intellectual power. His house descended to her, a roomy and handsome old mansion which is still standing. For two generations it was one of the literary centers of a literary town. This Litchfield, at this period, certainly was. Besides the Law School, it was the seat of a young ladies' boarding

school of the first rank, kept by Miss Sarah Pierce. In one of its suburbs was a classical academy of considerable repute, established and conducted largely as a work of philanthropy by a cultivated scholar, who was a man of property and felt that he held it, partly, as a trust for his fellow citizens. Lyman Beecher, the leading pulpit orator among the American clergy of his generation, as his son was for the generation which followed, was thundering weekly from the pulpit, and enlivening the society of the village by his sparkling wit and untiring spirit of inquiry from Monday morning to Saturday night.

Miss Pierce was a believer in the necessity of active physical exercise for the maintenance of health. A good walker herself, she insisted that her pupils should follow her example. To make it attractive, she sometimes had them march in procession attended by music, and we may be sure that the law-students heartily approved of her methods. One of them¹⁵ in later life thus described his earliest impressions of the village as he entered its sylvan streets in the summer of 1823:

One of the first objects which struck my eyes was interesting and picturesque. This was a long procession of school girls, coming down North street, walking under the lofty elms, and moving to the music of a flute and flageolet. The girls were gayly dressed and evidently enjoying their evening parade in this most balmy season of the year. It was the school of Miss Sally Pierce, one of the earliest and best of the pioneers in American female educa-

¹⁵ Edward D. Mansfield, LL. D., in his "Personal Memories."

tion. The scene has never faded from my memory. The beauty of nature, the loveliness of the season, the sudden appearance of the school of girls, all united to strike and charm the mind of a young man who, however varied his experience, had never beheld a scene like that.

Miss Pierce had a few of her pupils in her own family. The others boarded where they could in the village. The families into whose houses they were thus introduced often received law students in the same way. On Friday afternoon law students were permitted to visit the seminary. Occasionally there was a ball in the large school-room to which they were invited, and they would return the courtesy by a ball in the dancing hall of the village tavern, being allowed to invite all the girls who were over sixteen. There was a bowling alley, which was open to the students of each school. Miss Pierce wrote plays for her pupils to act. Law students were invited to the performance and gave in return plays not of Miss Pierce's composition, which the older girls were allowed to attend.¹⁶

The law students shared also to some extent in the general social life of the place. It was largely colored by religion. That was still the soul of such American literature as could be said to exist. They had their own square pew in the meeting-house. Once a week they made up a Bible class in Dr. Beecher's study. An occasional call at one of the spacious old mansions that lined the broad streets

¹⁶ Vanderpoel, *Reminiscences*, pp. 134, 289, 297, 322, 334.

introduced them to homes of comfort and refinement. One belonged to Oliver Wolcott, who was Secretary of the Treasury in the administrations of Washington and Adams and afterwards for ten years Governor of Connecticut. His wife was the *grande dame* of the town. At a party in Washington at which she appeared, Mr. Liston, the British minister, was chatting with General Tracy, when she swept by them. "Senator," said Mr. Liston, "that woman would be admired even at St. James." "Sir," was the reply, "she is admired even on Litchfield Hill."

The Law School was at first established in a little one-story building adjoining the house of Judge Reeve. Subsequently, when Mr. Gould became one of the instructors, some of the exercises were conducted in a similar building near his residence, and this became its final seat after the retirement of its founder in 1820.

Judge Reeve's method of instruction was based on written notes, from which he lectured with frequent off-hand explanations and illustrations of a colloquial nature.¹⁷ His thoughts often outran his utterance, and he would leave a sentence unfinished to begin another, as if distracted by what one of his students described as a "huddle of ideas."¹⁸

Judge Gould clung closely to his manuscript, from which he read so slowly that the students, each seated

¹⁷ Joel Parker, *The Law School of Harvard College*, p. 9.

¹⁸ *History of Litchfield County*, p. 15.

at a separate desk, could write down everything that was uttered.¹⁹ This each was expected to do, then and there. The notes thus taken, and also those made of Judge Reeve's lectures, the students afterwards copied with care into large folio volumes. They filled in all five of these, the pages of which measured about nine and a-half by seven and a-half inches. The notes of those which Judge Reeve had been accustomed to give before the accession of Mr. Gould could be contained in one or two volumes of much smaller size.²⁰

The ground covered by the two instructors in the early years of the nineteenth century was apportioned in the following manner:

Subject	Lecturer	Volume and pages of note-books oc- cupied by it. ²¹
Municipal Law	Gould	I 50
Master and Servant	Reeve	44
Baron and Feme	"	92
Parent and Child	"	48
Guardian and Ward	"	10
Executors and Administrators.....	"	69
Sheriffs and Gaolers	"	41
Contracts	Gould	113
Fraudulent Conveyances	"	33

¹⁹ One of the volumes is in the State Library of Connecticut, containing the notes made by Roger Milton Sherman.

²⁰ The foregoing follows notes taken in 1813 by Roger S. Baldwin.

²¹ Theodore D. Woolsey, *Historical Discourse at the Semi Centennial of the Yale Law School*, p. 8.

Subject	Lecturer	Volume and pages of note-books oc- cupied by it.
Bailments	Gould	II 55
Inns and Innkeepers	"	9
Covenant-broken	"	42
Action of Debt	"	9
Action of Detinue	"	2
Action of Account	"	9
Notice and Request	"	3
Assumpsit	"	31
Defences to Actions	"	72
Private Wrongs	"	74
Evidence	Reeve	72
System of Pleading	Gould	III 232
New Trials	"	27
Bills of Exceptions	"	4
Writs of Error	"	18
Practice in Connecticut	"	68
Bills of Exchange and Promissory notes	Reeve	IV 120
Insurance	"	122
Charter Parties	"	5
Joint Owners of Vessels	"	2
Partnership	"	7
Factors	"	6
Stoppage in Transitu	"	2
Sailors' Contracts	"	2
Powers of Chancery	"	51
Criminal Law	"	64
Real Property	Gould	V 115
Estates upon Condition	Reeve	83
Modes of Acquiring Estates	"	23

Subject	Lecturer	Volume and pages of note-books oc- cupied by it.	
Devises	Reeve	V	57
Title by Deed	Gould		40
Actions for Injuries to Things Real..	"		46

Constitutional Law and the legislation of Congress under the Constitution of the United States were later made also the subject of instruction.²²

While on the bench Judge Reeve's voice became seriously affected by some malady which reduced it to a shrill whisper. He could be heard by a number of people, but only by their preserving the strictest silence and the closest attention. This misfortune did not prevent the discharge of his judicial duties, nor the continuance of his instruction at the school, but it could not but be a grave impediment to his efficiency.

A graphic picture of the school, as it impressed itself on the memory of one of its sons after Judge Reeve had lost his voice, was thus sketched by Hon. Charles G. Loring, of the Boston bar, in 1851, at a meeting of the "Story Association" of the Harvard Law School.

Thirty-eight years ago . . . there existed an extensive Law School in the State of Connecticut, at which more than sixty students from all parts of the country were assembled,— every State then in the Union, being there represented. I joined it in 1813, when it was at its zenith, and the only prominent establishment

²² Address of Chief-Justice Church, Litchfield Centennial, p. 51. Proceedings at the Litchfield Centennial Celebration, p. 52.

of the kind in the land. The recollection is as fresh as the events of yesterday, of our passing along the broad, shaded streets of one of the most beautiful of the villages of New England, with our ink stands in our hands, and our portfolios under our arms, to the lecture room of Judge Gould,—the last of the Romans of Common Law lawyers; the impersonation of its genius and spirit. It was, indeed, in his eyes the perfection of human reason—by which he measured every principle and rule of action, and almost every sentiment. He was an admirable English scholar; every word was pure English, undefiled, and every sentence fell from his lips perfectly finished, as clear, transparent, and penetrating as light, and every rule and principle as exactly defined and limited as the outline of a building against the sky. . . . From his lecture room we passed to that of the venerable Judge Reeve, shaded by a venerable elm, fit emblem of himself. He was indeed, a most venerable man, in character and appearance,—his thick, gray hair parted and falling in profusion upon his shoulders, his voice only a loud whisper, but distinctly heard by his earnestly attentive pupils. He, too, was full of legal learning, but invested the law with all the genial enthusiasm and generous feelings and noble sentiments of a large heart at the age of eighty,²⁸ and descanted to us with glowing eloquence upon the sacredness and majesty of law. . . . We left his lecture room, Sir, the very knight errants of the law, burning to be the defenders of the right and the avengers of the wrong; and he is no true son of the Litchfield School who has ever forgotten that lesson.

Mr. Reeve gave up practice in the county court soon after opening his law school, but continued to take cases in the higher courts until he went on the bench. Mr. Gould also combined the practice with the teaching of law. He preferred the work of the court room to that of the office, except so far as the

²⁸ He was in fact ten years younger.

office served to shape a cause for trial. One of his contemporaries has thus described his powers as an advocate when he was a man of middle age:

As a reasoner Mr. Gould was forcible, lucid, and logical; as a speaker his voice was very pleasant, and his language pure, clear, and always appropriate. He never aspired to high strains of impassioned eloquence, and rarely, if, ever, addressed himself to the passions of the court and jury, but to their understanding only.²⁴

Litchfield was the seat of three courts. Two terms of the Superior Court were held there annually, one in January and one late in August. The county court sat there twice a year up to 1804, and three times a year after that date. The Court of Probate for seven towns had its regular office in Litchfield, and resort could be had to that practically every day in the year. When Judge Reeve was not holding court out of town, he could, for weeks at a time, conduct the entire exercises of the Law School and thus allow Mr. Gould to try long cases not only in Litchfield but in other counties. The Supreme Court of Errors held only one term annually, beginning in June. This fell in the vacation of the Law School, so that both Judge Reeve and Mr. Gould had been able to attend it, without embarrassment.

In May, 1814, Judge Reeve was elected Chief Justice of the state, but his term was a short one. In October of the same year he reached the age of seventy which, under a statute passed a few years

²⁴ History of Litchfield County, 1881, "Bench and Bar."

before, disqualified him for reëlection. At this time the judges were elected annually, and he therefore retired to private life in the following spring. For the next six years he gave more of his time to the Law School. But what it thus gained in one direction it was soon to lose in another. In May, 1816, Jonathan Ingersoll, one of the judges of the Superior Court and of the Supreme Court of Errors, was elected Lieutenant-Governor of the state, and his place in these courts was filled by the appointment of Mr. Gould, who took his seat at the June Term of the Supreme Court of Errors.

He came to the bench at the age of forty-six, with fixed habits of thought and modes of expression. At the bar he had been outstripped by several who had a better title to be called its leaders. They were for the most part his elders, but they also had qualities in which he did not so fully share. If their view of the strong points in a case were not more correct than his, they could, at all events, enforce it with more effect. If he knew more of books, they knew more of men. None of them were his superiors in elegance of scholarship, purity of taste, grace of manner, rhetorical finish, and logical power;²⁵ but there are other qualities that tell more with a jury and have a deeper seat in the mind.

What had been his fate at the bar pursued him to the bench. He was now to be overshadowed there.

²⁵ Rev. Lyman H. Atwater, D.D. *Sketch of the Life and Character of Roger Minott Sherman*, p. 5.

Chief-Justice Swift, a year before, had taken the place vacated by Reeve. Under all previous chief-justices it had been the custom of the court to distribute the work of preparing its opinions among the members in equal proportion. Each justice to whom such a duty was assigned delivered the opinion, and the others (unless in case of dissent from the judgment) generally contented themselves with simply stating their concurrence. Swift introduced the practice which Chief-Justice Marshall had by that time made familiar to the courts of the country. On the days when decisions were announced he, with rare exceptions, gave his own opinion first; and this, whether it were that of the court or expressed his dissent.

Swift was then at the height of his reputation. His authorship of the standard treatise on the laws and government of Connecticut; his long and varied public services; his commanding presence; his rapid and forcible mode of expression; his judicial experience now extending over fourteen years;—all combined to give whatever he uttered as Chief-Justice the stamp of authority, and make in every case the first word of the court also the last word.

During his first year in his new office, the associate-justices, though not quite relishing the innovation, generally followed what had been their former practice, when they prepared opinions in rotation. Each, in order of seniority, pronounced his concurrence with the opinion of the Chief-Justice,

unless he dissented, in which case he would deliver a separate opinion, or concur in one delivered by another. At the opening of the second year Judge Gould took his seat. He was naturally disinclined always to sit silent, where he had an equal voice. Justly conscious of possessing great powers of reasoning and of being the master of a good style of expression, he felt that it was neglecting an opportunity, if not a duty, never to express his own opinion except when he chanced to disagree with the conclusions of his associates. The result was that, from the first, he began to deliver concurrent opinions, even if he followed the same line of reasoning pursued by the Chief-Justice. In addition to the considerations already stated, this, perhaps, was not an unnatural result of his long occupancy of the teacher's desk. An instructor of the young in any study is apt to think that no one can explain a point of difficulty in that study so well as himself. It is seldom that a pupil can; and he has no others, with whom to measure himself in the same field.

At his first term of court Judge Gould pronounced at least half a dozen such concurring opinions, no one of which was stronger or clearer, and each of which was longer, than that of the Chief-Justice.

The latter, whose mental characteristics are elsewhere described in this volume,²⁶ relied less on authority than on principles. His opinions often cite no cases, and never many. Judge Gould, on the

²⁶ See *ante*, p. 101.

other hand, was apt to fortify every position which he advanced by reference to the English reports. Without being pedantic, he often seemed unnecessarily anxious at every step to make the ground behind him secure. He did not strike at once for the main point that must control the decision, but stopped to weigh every consideration that might be advanced in opposition to his conclusions.

The court at this period was a strong one. Trumbull, the senior associate-justice, was not only a good lawyer but also a man of high literary culture. "Peter Parley" (Samuel G. Goodrich), who was exceptionally familiar with American men of letters of the first quarter of the nineteenth century, pronounced him the first of them all. Nathaniel Smith was born with a legal habit of thought, and had been one of the acknowledged leaders of the bar. Simeon Baldwin was a clear thinker, and wrote with ease and spirit. Stephen T. Hosmer, a son of Titus Hosmer of the early Court of Appeals of the United States, who became Chief-Justice in 1819, had remarkable powers of expression. His style was lucid, and his whole treatment of a subject strong and effective. When Swift's successor as chief-justice, he followed for ten years Swift's method of speaking for the court in all matters, great and small, except when he dissented. In that case he differed from Swift in allowing the majority to declare their opinion first.

When Gould, on his accession to the bench, found

all these men willing, with rare exceptions, to let the Chief-Justice be the sole mouth-piece of the court, it was certainly questionable whether its junior member was to be justified in not following their example. His practice in this respect did not add to his reputation. It swelled the bulk of the reports, without always, or even often, contributing to their essential value. It would appear that the reporter did not relish it from his record of the case of *Hutchinson vs. Hosmer*.²⁷ In this, after giving the opinion of the Chief-Justice, saying of six associates, whom he names, that they "were of the same opinion," and giving a concurring opinion by another, he drily adds: "Gould, J., concurred in the opinion delivered by the Chief-Justice, without making any additional remarks."

A dissenting opinion often shows its author at his best. He has a special interest in defending his conclusions with all the force which he can command. Whenever Judge Gould differed from his associates on a question which he deemed of serious importance, he took his stand resolutely and stated his reasons at length. Shortly after he came on the bench, a case came up which turned upon the question whether a mortgagee could sue the mortgagor in ejectment without any previous demand or notice. The majority of the court held that he could. Gould was one of two dissenting judges, and emphatically declared that such a doctrine was, in his

²⁷ 2 Connecticut Reports 341.

judgment, repugnant to the plainest principles of law and justice.²⁸

At the same term a new trial was sought in an action of slander, in which the defendant was held liable for having said that the plaintiff had perjured himself, as a witness at a church meeting called to discipline a member of the church. The majority of the court held that these words were actionable *per se*. Gould was one of three who dissented. To announce such a doctrine, he said, was to make law *de novo*, and introduce a new species of perjury, hitherto unknown in any criminal code whatsoever. It was "repugnant to the first principles of jurisprudence to extend criminal law analogically."²⁹

The judges of the higher courts in Connecticut had been annually appointed until the adoption of her Constitution in 1818. That gave them a tenure during good behavior or till the age of seventy. The Federalists had now lost control of the state and in 1819 Judge Gould was not re-appointed. His *alma mater* took the opportunity to show that it was for no demerit of his, by conferring upon him at the next Commencement the degree of Doctor of Laws.

He did not resume practice at the bar, although occasionally acting as counsel in the preparation of important cases.³⁰ Substantially all his working

²⁸ Rockwell vs. Bradley, 2 Connecticut Reports, 1, 14, Cf. Wakeman vs. Banks, 2 Connecticut Reports, 445, 457.

²⁹ Chapman vs. Gillet, 2 Connecticut Reports, 40, 61.

³⁰ W. A. Beers, Biographical Sketch of Roger Minott Sherman, p. 32

time he gave to the school, and to the gratification of his strong literary tastes in the enjoyment of his library.

He was in the prime of life for a lawyer when, at the age of forty-eight, he thus made the advancement of legal education his sole life-work. In that field, as a teacher of law, he then stood first in the United States. Nowhere as yet had a law school been set up that deserved the name, except on Litchfield Hill, and there its original founder had sunk, with increasing years, to a secondary place.

Judge Gould's eyes had gained strength as he passed from youth to middle age, and he was now able to indulge freely in the study of general literature. History and *Belles-Lettres* particularly attracted him. His reading was wide, and what he read was not dismissed from his mind without being made the subject of thought and reflection.

In 1825 he was the Commencement orator at Yale before the Phi Beta Kappa Society, and took for this subject *The Efficient Power of Intellectual Influence*. In matters of civil government, it made, he argued, public opinion, and the most absolute despotism was as truly dependent on it for its support as was the most democratic of republics. Culture was also the beginning of true religion. Christianity sank in the dark ages because learning sank. It rose when learning rose. Without the assistance of the literature of the time there would have been no Protestant Reformation.

These positions were somewhat criticised, and in a note to the oration, when it was printed, he defended them with spirit. The revival of learning, he said, had indeed long preceded the birth of Luther. But after two hundred and fifty years its influence was found insufficient to support the efforts of Wickliffe, Huss, and Jerome. Not until the art of printing on paper had spread over western Europe and the Augustan age of the new learning came in with the pontificate of Leo X, was there intelligence enough diffused through Christendom to secure a hearing for serious reforms. The enemies of Luther were the enemies of learning. As Erasmus had declared, "*Sic agunt ut non minus lædant optimas literas ac linguas, quam Lutherum.*"

Judge Reeve's share in the work of the Law School was not large after he left the bench, and he withdrew from it altogether in 1820, although Judge Gould continued to pay him a-third of the net receipts from tuition, annually. Four years earlier Judge Reeve had published a work on Domestic Relations, founded on his lectures on that subject previously given, and five years later he put out another book of a similar nature on the Law of Descents in the several states. His place was supplied, after a few years, by bringing in Jabez W. Huntington, a member of the Litchfield bar and one of the alumni of the school, who continued his connection with it as long as it was maintained, then becoming an associate-justice of the Supreme Court of Errors

of Connecticut and subsequently a senator of the United States.

At this period the regular course of study at the school was completed in fourteen months, including two vacations of four weeks each, one in the spring and another in the autumn. One hundred dollars was charged for the first year of tuition and sixty dollars for a second, which of course, if pursued to the end, consisted largely of the repetition of lectures previously heard. Few students ever remained more than eighteen months. After the retirement of Judge Reeve the courses were re-arranged under forty-eight titles. Judge Gould occupied from an hour and a-quarter to an hour and a-half in lecturing, daily. Reported cases were still comparatively few, and he aimed to notice all that were of importance decided in the English courts. The students were expected to examine some of these for themselves during the remainder of the day, and to accompany each lecture course by parallel readings in standard text-books. On Saturdays Mr. Huntington acted as a quiz tutor, and conducted a close examination on the lectures of the week, aiming to turn attention to the principles underlying every rule. One or two moot courts were held weekly, Judge Gould presiding. The briefs of counsel were carefully prepared together with the opinion of the court. There was an attorney-general elected by the students. A lively account of one of these cases has been preserved in a letter from Jessup W. Scott, of

Toledo, Ohio, of the class of 1822, to Mrs. Horace Mann.³¹

Our lecturer, Judge Gould, was, *ex officio*, the bench of our moot court: the next office, that of attorney-general, was elective by the students. Mr. Mann had been elected to that office before my arrival. . . . In our moot courts, held weekly, the question of law to be discussed was proposed the preceding week by Judge Gould; and four students, two on each side, were detailed to discuss it; the judge, at the close of the arguments, summing up and giving the grounds of his judgment at length. . . . On one occasion, when the side he (Mr. Mann) sustained was opposed to the decision of the judge previously written out, it was the general opinion of the school that Mr. M. made out the best case. And of this opinion seemed to be the judge; for after reading the arguments to sustain his decision, he proceeded to reply to some of the points of Mr. Mann, and, as we thought, with some exhibition of improper feeling or wounded self-esteem.

It was, indeed, often no easy matter for an instructor in such a school to keep so far ahead of his pupils that they would always be forced to acknowledge his superior authority. Many of them were practicing lawyers who came there for a year to round out their professional education. Many more were men of high intellectual power, destined to play a great part at the bar and on the bench, or like Horace Mann, in the fields of literature and education.

Those who attended the school before Judge Gould's accession as an instructor numbered in all

³¹ Life of Horace Mann, 1865, p. 30.

two hundred and ten; those who attended subsequently, more than eight hundred, every state in the Union being represented on the rolls. Three of them became associate-justices of the Supreme Court of the United States (Henry Baldwin, Levi Woodbury, and Ward Hunt); one, vice-president of the United States ³² (John C. Calhoun); five, members of the cabinet; ten, governors of states; sixteen, senators of the United States; nine, chief-justices of states; forty-one, judges of the higher courts of states; four, judges of the Circuit or District Courts of the United States; fifty-five, members of congress; five, representatives of the United States at foreign courts, among whom was the eminent publicist, William Beach Lawrence; and three, college presidents.

On each of these leaders of men James Gould stamped the impress of his powerful mind and scholarly culture. He taught them more than law. Each could learn from him the faculty of stating propositions in definite and simple form, and following them up by orderly and logical methods of explanation.

His excellence as a teacher shines out from his "Principles of Pleading," published in 1832. It has no extraneous matter. Beginning with a series of clean-cut rules and definitions, it proceeds with the inevitable march of mathematics to apply them to the successive papers by which, at common law, an issue

³² Another, Aaron Burr, commenced his legal education in Judge Reeve's office in Litchfield in 1775.

was framed for trial. Most works on pleading, he observes in his preface, are manuals or books of reference. They present it as an art rather than as a science. His hope was to render its doctrines more intelligible by showing them to be reasonable,—a system of consistent principles, rather than a compilation of positive rules.

In substance and with few additions the book presents his longest course of lectures (for in his instruction he insisted that pleading was the key to all English law) in their perfected form. It has gone through several editions and remains both a standard authority and a model text-book.

In 1829, Judge Gould took an active part in the controversy that followed the publication in 1827 of Jefferson's letter to Governor Giles, stating that John Quincy Adams had told him that designs of disunion were meditated in New England early in the century. Uriah Tracy had been mentioned as one of those who were engaged in them. Judge Gould wrote to those of the leaders among Connecticut Federalists of the Jeffersonian era who still survived, for their recollections as to this matter, and published them, with caustic comments on the assertions of President Adams, in a lengthy communication to a New York newspaper.³³ It was a vigorous and loyal effort to vindicate the memory of his father-in-law; but other letters from other sources of earlier date, that have since come to light, seem to show that

³³ Henry Adams, *New England Federalism*, pp. 93-106.

Adams was substantially in the right. While there was no definite plan of secession, the right to secede was certainly asserted, and the policy of a resort to it advocated in 1804 by not a few Federalist leaders, and among others by Judge Reeve in confidential correspondence with Tracy.³⁴

The Litchfield Law School was never incorporated. The attendance of students rose to its greatest height at the time when Mr. Loring was there. This was during the War of 1812 with Great Britain, which by shutting the ordinary avenues of business activity led an unusual number of young men to turn to the law. Fifty-five entered the school in 1813. The next largest entering class was ten years later, which was composed of forty-four.

From 1826 it began to decline quite rapidly. The publication of Swift's "Digest" and Kent's "Commentaries" made its whole theory of instruction antiquated. The Harvard Law School had been founded in 1817, and that of Yale in 1824. No unendowed private institution can long maintain a competition with one supported by permanent funds and forming part of an established university. But six students were in the entering class of 1833. Judge Gould's health had been slowly breaking down for years, and the time had evidently come to close the school. He had been able to maintain it so long only by the aid of a son who sometimes read his lectures to the class, and of a young lawyer of Litch-

³⁴ H. C. Lodge, *Life and Letters of George Cabot*, p. 442.

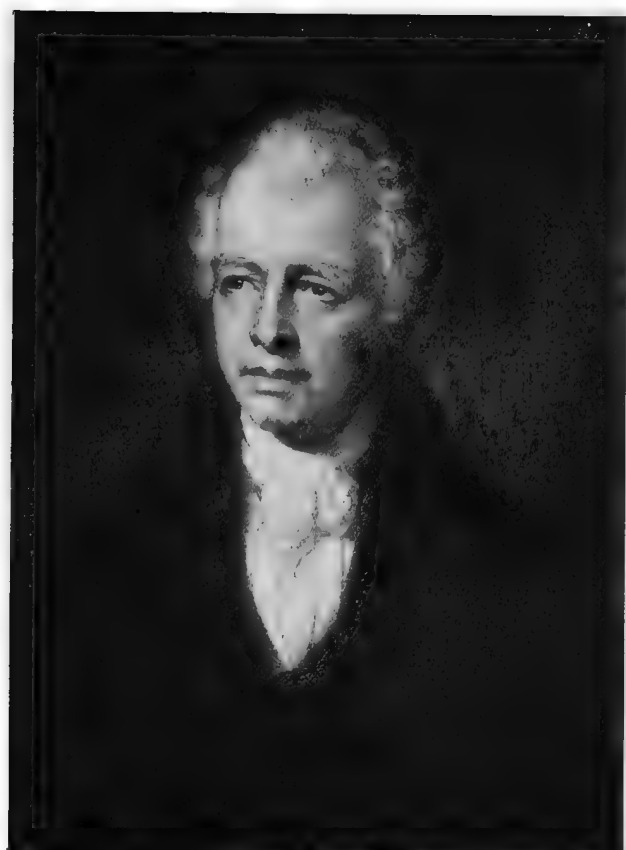
field whose assistance in addition to that of Mr. Huntington, was occasionally invoked, Origen Storrs Seymour, afterwards Chief-Justice of Connecticut.

Judge Gould was a law school teacher, without a break, from 1798 to 1833, a period of thirty-five years. He died at Litchfield on May 11th, 1838, at the age of sixty-seven.

JAMES KENT.

JAMES KENT.

From an etching on copper plate, by James S. King, after a painting by Rembrandt Peale, in the possession of William Kent, grandson of the Chancellor. The etching is copyrighted and published by Charles Barmore, New York, and reproduced by his permission.



JAMES KENT.

1763-1847.

BY

JAMES BROWN SCOTT,

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THE career of Chancellor Kent¹ is perhaps the most signal example of success achieved in a profession by one to whom its practice was distasteful, not to say nauseating or irksome, and there is assuredly no single practitioner in this country of ours who has laid his brethren at the bar under greater obligations, by a lifetime consecrated, as it was, to the acquisition of the principles underlying law and to their systematic and masterly exposition.

The praise of the contemporary is more often pleasing than just, and posterity takes but scant ac-

¹ The primary source of the following appreciation is the Memoirs and Letters of Chancellor Kent by his great grandson, William Kent, Esquire, of the New York bar.

Duer's Discourse on the Life, Character, and Public services of James Kent (1848) is of the greatest importance.

Kent has been allowed as far as possible to tell his story in his own words, and the language of conservative authorities has been frequently quoted lest the present writer's bias towards Kent might seem to lead him astray.

count of the language of personal tribute or affectionate eulogy, and yet there are indeed few critics among us who would not subscribe to the solemn and measured judgment of Charles Sumner, written in a personal letter to the Chancellor and Commentator when his faculties were still unimpaired and years of usefulness lay before him.²

I feel happy in the opportunity afforded by this letter of expressing to you my lively sense of the deep debt which every American lawyer owes to you, and no one feels it more than myself, for the light which you have cast over the dark and rugged paths of legal study; first, by the large and splendid series of judicial opinions, in which justice was so nobly administered and the law so steadfastly advanced; and second, by your admirable commentaries, which have now become the manual of the practitioner, as they have since their first publication been the institute of the students. Not a day passes without reminding me of the value of your labors, and without strengthening in me those feelings of attachment as towards a cherished instructor.

And in a second letter this same Charles Sumner—then an ornament of the bar as he later was an ornament of the senate—allowed himself to say:³

The mighty tribute of gratitude is silently offered to you from every student of the law in our whole country. There is not one who has found his toilsome way cheered and delighted by the companionship of your labors, who would not speak as I do, if he had the privilege of addressing you.

These two paragraphs, taken from one commonly considered to represent the unemotional and intellec-

² *Memoirs and Letters*, p. 203.

³ *Memoirs and Letters*, p. 237.

tual type of New England, might be extended indefinitely, but they sound at once the source and depth of Kent's professional attainments and indicate his commanding, if not isolated position, in our jurisprudence. For it is as the Judge, preëminently, the Chancellor and the Commentator, that Kent was known to his contemporaries and it is as Chancellor and Commentator that he makes his appeal to an admiring and grateful posterity.

The study of the law was the choice of his youth; its practice was the occupation of his manhood; its exposition from the bench, in the classroom and the printed page, was alike the glory and consolation of full maturity and of declining years. Barely out of college, he wrote, in 1782, to a friend:⁴

The study of the law has absorbed my principal attention for the last twelve months. Law, I must frankly confess, is a field which is uninteresting and boundless. Notwithstanding, it leads forward to the first stations in the State. The study is so encumbered with voluminous rubbish and the baggage of folios that it requires uncommon assiduity and patience to manage so unwieldy a work. Yet this adage often serves to steel my courage and smooth the rugged moments of despair: 'The harder the conflict the more glorious the triumph.'

And in a letter written two years later, he said:⁵

I am yet a poor clerk to an attorney, and all my property is confined to my chest; but I have a thirst for knowledge and a determination to put in a claim for some of those honors which im-

⁴ *Memoirs and Letters*, p. 16.

⁵ *Memoirs and Letters*, p. 17.

print immortality on characters; and this thirst and this determination, I trust, under providence, will lead me forward to some of those good and generous actions, and that sacred integrity of conduct and principle, which will render me not a dishonorable object to the few who love me.

These two passages give a faithful portrait of the youth and of the stupendous ambition that well-nigh consumed the little man. The law was not an end in itself; it was simply the means. The end was public distinction, and unswerving devotion to the end produced in him, as it seldom fails to do, the desired result. A few terms in the Assembly, an unsuccessful candidacy for congress, were episodes in a career otherwise devoted wholly to the law. The bench was the hope; an appointment to the bench at the early age of thirty-five realized the immediate object of his ambition and opened up the way to "some of those honors which imprint immortality on characters."

It has been said that the practice of law was nauseating or irksome to him, and for this conclusion, his oft-repeated statements are an unanswerable authority.

Advancement at the bar was slow and his success was as problematical as it was slow. It is natural to delight in what we do easily and well, and it is rare that we like what we do badly or with great difficulty. Kent felt that he was not qualified for the bar and he stated his shortcomings without reserve or self-depreciation. For example, in speak-

ing of the Mastership in Chancery to which he was appointed in 1796, he said:⁶

This office promised me a more steady supply of pecuniary aid (of which I stood in need), and it enabled me in a degree to relinquish the practice of an attorney, which I always extremely hated. My diffidence, or perhaps pride, was a principal cause of this disgust, since I found that I had not the requisite talents for a popular and shining advocate at the Bar.

And in speaking of the Recordship of New York to which he was appointed in 1797, he said:

This was very gratifying to me, because it was a judicial office, and I thought that it would relieve me from the drudgery of practice, and give me way of displaying what I knew, and of being useful, and to my taste.

And in another passage he says:⁷

I wanted judicial labors to teach me precision. I soon became considerably involved in business, but was never fond of, nor much distinguished in, the contentions of the bar.

A final quotation will show how completely and how happily the man and the occasion met:⁸

In February, 1798, writes Chancellor Kent, in his Memoranda, I was appointed to the office of a Judge of the Supreme Court. This was the grand object of my ambition for several years past. It appeared to me to be the true situation for the display of my knowledge, talents, and virtue, the happy mean of placing me beyond the crowd and pestilence of the city, of giving me opportunities to travel, and to follow literary pursuits,—a taste

⁶ *Memoirs and Letters*, p. 80.

⁷ *Memoirs and Letters*, pp. 62-63.

⁸ *Memoirs and Letters*, p. 108.

for which is, after all, the most solid and permanent of all sub-lunary enjoyments. By the acceptance of this office I renounced all my offices in New York, with all their accumulated income, and all my prospects of wealth, for a moderate but permanent support, for leisure to study, for more rural enjoyments, and for a more dignified reputation.

It is thus abundantly clear that Kent's ambition was for the bench, not for the rewards of the bar; for his nature was fortunately judicial, and a seat on the bench in early life rendered it not merely possible but necessary to follow the natural bent and line of least resistance throughout the period of the maturity of his powers. An appointment to a professorship of law at Columbia College, when he reached the retiring age in 1823, supplied an incentive for the composition of the Commentaries whereby the studies and reflections of a lifetime were fortunately preserved for a future and for a public which would otherwise have known and revered him as the unfamiliar embodiment of a great and wise judge.

Kent's biographer assures us that the Chancellor and Commentator was of pure New England descent for which fact, it would seem, Kent deserves neither praise nor blame. Like most Americans he made his ancestry and the career of the famous scion of the transplanted stock has led the curious to brush away the earth and find that the roots spread into New England. James Kent, nevertheless, belongs to New York, and it is New York, not New England,

that was the scene of his labors and the object of his affection. He was born in Philippi, Putnam—then Dutchess—County, New York, July 31st, 1763, and died in New York, December 12th, 1847. As grandfather and father, the one an estimable clergyman of the Presbyterian school, the other a lawyer, were graduates of Yale College, it was but natural that the hopeful James should be sent thither for his education. He entered New Haven College in September, 1777, and was graduated September 22d, 1781. Of the four years spent in this venerable institution he says:⁹

My four years' residence at New Haven College were distinguished by nothing material in the memoranda of my life. I had the reputation of being quick to learn, and of being industrious and full of emulation. I surpassed most of my class in historical and belles-lettres learning, and was full of youthful vivacity and ardor; I was amazingly regular, decorous, and industrious, and, in my last year, received a large share of the esteem and approbation of the President and tutors. I left New Haven September, 1781, clothed with college honors, and a very promising reputation.

He was the youngest of the class, and the peculiar characteristics of his mind were then sufficiently marked to be noted. In the language of a class-mate: "In history, in the belles-lettres studies, and in reading generally, he excelled them all. His attention to what he read was strict and his memory was uncommonly retentive. It was the common re-

⁹ *Memoirs and Letters*, pp. 8-9.

mark of his companions that they could generally tell the author he last read by the style and manner of his next composition.”¹⁰

The taste for literature, a feeling for style, and a retentive memory characterized the man throughout life, and the lists of works read, which his admiring biographer prints in various portions of the *Memoirs*, are simply astounding. But these things in themselves, at once an accomplishment and a passion, do not account for his greatness. They adorned a mind which they did not and could not create; and they added learning and refinement to a native strength of intellect.

That the young man should have taken to law was natural enough, for his father was a lawyer, but it is perhaps not too much to say that the choice was dictated largely, if not wholly, by the love of literature. To quote his own words:

When the college was broken up and dispersed in July, 1779, by the British, I retired to a country village, and, finding Blackstone's *Commentaries*, I read the four volumes. Parts of the works struck my taste, and the work inspired me, at the age of fifteen, with awe, and I fondly determined to be a lawyer.

Historical investigation shows that Blackstone was far from infallible, but it is absurd to decry the solid and substantial merits of the work. It survives, and deserves to survive, despite tory prejudices and serious misstatements.¹¹ Its merits are on the surface

¹⁰ *Memoirs and Letters*, p. 10.

¹¹ For instance, the great Lord Redesdale said, in *Shannon vs. Shan-*

and patent to any one with eyes to read and taste to appreciate a style at once strong and vigorous and full of stately measure. With Blackstone the common law crossed the threshold of literature, and even Bentham was forced to acknowledge the literary merits of the Commentaries in his elaborate attack on the doctrines of the work.¹²

Correct, elegant, unembarrassed, ornamented, the style is such as could scarce fail to recommend a work still more vicious in point of matter to the multitude of readers.

He it is, in short, who, first of all institutional writers, has taught Jurisprudence to speak the language of the Scholar and the Gentleman: put a polish upon that rugged science: cleansed her from the dust and cobwebs of the office: and if he has not enriched her with that precision that is drawn only from the sterling treasury of the sciences, has decked her out, however, to advantage, from the toilette of classic erudition: enlivened her with metaphors and allusions: and sent her abroad in some measure to instruct, and in still greater measure to entertain, the most miscellaneous and even the most fastidious societies.

The merit to which, as much perhaps as to any, the work stands indebted for its reputation, is the enchanting harmony of its numbers: a kind of merit that of itself is sufficient to give a certain degree of celebrity to a work devoid of every other. So much is man governed by the ear.

Embarrassed, as a man must needs be, by this blind and intractable nomenclature, he will be found, I conceive, to have done as much as could reasonably be expected of a writer so circum-

non, 1804, 1 Schoales and Lefroy's Reports, 324, 327: "I am always sorry to hear Mr. Justice Blackstone's Commentaries cited as an authority; he would have been sorry himself to have the book so cited; he did not consider it such." But as to this last statement, *quære*.

¹² Preface to Fragment on Government, Bentham, pp. 116-122.

stanced; and more and better than was ever done before by any one.

In 1781 Kent entered the office of Egbert Benson, then Attorney-General of the state, and the reading of a twelvemonth, as chronicled in his Memoranda, is full of interest.¹³

I read, the following winter, Grotius and Puffendorf, in huge folios, and made copious extracts. . . . I abridged Hale's History of the Common Laws, and the old Books of Practice, and read parts of Blackstone again and again.

It thus appears that the young student grounded himself not merely in the principles of the common law, but that he learned those principles in their historical development. The law was grasped as a system, and the history of the law, so necessary to its thorough knowledge, was acquired early in life. Hale and Blackstone were mastered. This was in itself no narrow training, but it is interesting to note that the young man branched out in the law of nations and of nature. International Law, the Common Law, and its history, formed a part of his original equipment, and it is not too much to say that the influence of these works is traceable throughout his entire career. Blackstone furnished the model for his Commentaries and the superb disquisition on the law of nations with which Kent prefaces the American Commentaries, is not only admirable and authoritative, but is the first original treatment in

¹³ Memoirs and Letters, p. 19.

the English language of the law of nations. Law was thus a system from the beginning and into this system every principle was fitted into its appropriate place.

After four years of earnest study—indeed he calls himself “the most modest, steady, industrious student that such a place ever saw”—he was admitted to the bar, and from 1785 until his appointment to the bench in 1798, and his consequent withdrawal from practice, he followed the profession of an advocate with but indifferent success. These thirteen years form the first important period of his professional life, and unhappy as they undoubtedly were, they nevertheless prepared him admirably for the more congenial and more memorable labors on the bench. These years may be dismissed with the statement that they were not wasted; that they were in fact a useful training and a necessary preparation for his subsequent career. They also brought him into contact with the prominent politicians of the day and his three terms in the Assembly gave him a practical insight into the workings of Government. There is no doubt that the experience in the legislature was of service to him later in his Commentaries, but one can never think of the impassioned and impetuous little Judge as a practical politician. Practice at the bar, service in the legislature, and the friendships of the day, increased his range of view, if they did not broaden his horizon. He was a Federalist, if not by birth, from study, connection and association.

The Federalist leaders were to him the natural leaders of the nation, and the fate of the nation to which he was devotedly attached, was somehow locked up with the success of the party of Jay and Hamilton. From Jay as Governor he owed his elevation to the bench, and from Hamilton he owed a lifelong inspiration. It was Hamilton, he tells us, that introduced the study of the civil law, and there is no doubt that the learning of the bench and bar was due to the incentive, if not to the actual example of Hamilton. The convention for the ratification of the Constitution met at Poughkeepsie in the summer of 1788 and Kent was an admiring and breathless listener.¹⁴

Hamilton, he said, generally spoke with great earnestness and energy, and with considerable, and sometimes vehement, gesture. His language was clear, nervous, and classical. He went to the foundation and reason of every doctrine which he examined, and he brought to the debate a mind richly adorned with all the learning that was applicable.

And in speaking of the bar in the Eighties, Kent gives a description of Burr and Hamilton full of interest:¹⁵

After the peace of 1783, said the Chancellor, a few gentlemen of the colonial school resumed their ancient practice; but the Bar was chiefly supplied by a number of ambitious and high-spirited young men, who had returned from the field of arms with honorable distinction, and by extraordinary application, they soon

¹⁴ *Memoirs and Letters*, p. 31.

¹⁵ *Memoirs and Letters*, pp. 31-32.

became qualified to commence their career at the Bar with distinguished reputation. . . . Colonel Burr was acute, terse, polished, sententious, and sometimes sarcastic in his forensic discussions. He seemed to disdain illustration and expansion, and confined himself with stringency to the point in debate. . . . But among all his brethren Colonel Hamilton was indisputably pre-eminent. This was universally conceded. He rose at once to the loftiest heights of professional eminence by his profound penetration, his power of analysis, the comprehensive grasp and strength of his understanding, and the firmness, frankness and integrity of his character.

It has been said that Kent served several terms in the Assembly. He was elected in 1790 and in 1792 he was reëlected. The next year he was a candidate for congress but was defeated by his brother-in-law, one Theodorus Bailey, by a majority of one hundred and thirty-two votes. It is clear that Kent felt his defeat somewhat keenly and although he did not leave Poughkeepsie solely on that account, there was an entire absence of regret. "This town," he said, "has discovered so little confidence in me on a recent occasion, and some principal men . . . have either been instrumental or willingly connived in such gross tales of calumny and hypocrisy to injure my reputation, that I shall leave this place with much less regret than might otherwise have arisen."

Settling in New York in 1793 he began at once the practice of law, in which he was not particularly successful, although his erudition was universally acknowledged.

In December of this year a professorship of law was created at Columbia College and Kent was chosen. This was a flattering tribute and undoubtedly gave him an introduction to and a standing in the new community. The matter of the professorship and its immediate and ultimate results will be discussed later.

In 1796 he was elected to the Assembly from New York and this election is important; for it undoubtedly led to the Mastership in Chancery (1796) and the Recordship (1797), both of which positions he held together, much to his profit and content. A year later Governor Jay gave him a further and signal mark of confidence in raising him to the bench of the Supreme Court. The ambition to cut a figure in public life had been realized and gave way to the larger and nobler ambition to fill worthily the position to which he was appointed.

With the year 1798, properly begins the second period of Kent's long professional career and it lasts for a quarter of a century until 1823, when he retired from the bench by reason of a foolish and arbitrary age limit. This limit was then sixty and it is interesting to note the difference of estimation in which the judge and the professor were then held. Unsited to the bench by reason of his three-score years he was yet considered fit for a professorship. This may mean that any sort of worn-out material would do for the chair, or that a professorship of law required fullness of years and a knowledge of

the law as the result of a lifetime of study. The latter view was clearly applicable to Kent although the popular view was and is probably the former.

The last period of Kent's life embraced twenty-four years, from 1823 to his death in 1847. It is altogether vain and childish to bemoan the loss to the bench by Kent's retirement. The bench was fortunate ever to have had him, and when he retired he had already rounded a career. That his services would have been valuable to the state there is no doubt; that they would have been as valuable to posterity as his Commentaries, composed in the years of his retirement and professorate, cannot be admitted for a moment.

A foolish regulation and a happy chance gave us the Kent as we know him.

But of each of these periods in turn. From 1798 to 1804, he was Judge of the Supreme Court; from 1804 to 1814 he was Chief-Justice of the Court, and for the last nine years of his judicial service he was Chancellor of the Court of Chancery. Kent has said that law and equity are two such distinct systems that it takes a lifetime to master either. He was the fortunate and living refutation of an otherwise happy truism.

It may be well to outline the history of the Supreme Court of which Kent became a member in 1798. For this purpose the following extract is made from a series of admirable articles entitled *Observations on the Particular Jurisprudence of*

New York, printed in the Albany Law Journal for 1881, from the pen of Mr. Robert L. Fowler, to which reference was made in the sketch of Chancellor Livingston.¹⁶

The continuance of the former Supreme Court of judicature, or a court of the same jurisdiction and like name, was evidently intended by the founders of the original State government,¹⁷ though its jurisdiction was not defined or regulated by constitutional enactment. Until the Constitution of 1846 took effect, this court exercised substantially the same jurisdiction which it possessed in the provincial epoch.¹⁸ The Supreme Court of New York was founded originally by an act of the Provincial Assembly, passed in 1691,¹⁹ and was subsequently continued by virtue of several ordinances promulgated by Lord Bellomont and Viscount Cornbury.²⁰ Samuel Jones, in his observations on the New Revised Laws of 1813; mentions other ordinances affecting this court,²¹ and the late Dr. O'Callaghan possessed an unpublished list of like ordinances, not easily to be found by persons unfamiliar with the archives of this State. This court, subsequent to the Revolution, never exercised the jurisdiction of the Court of Equity in the exchequer chamber, which it was held to possess in the celebrated case of *Cosby vs. Van Dam*,²² but took cognizance of those causes only which, in England, were cognizable in the King's Bench, Common Pleas, and the plea side of the Exchequer.²³ During the first twenty-two years of the State government there is no regular

¹⁶ Albany Law Journal, vol. XXIII, 288-289.

For the life of Chancellor Livingston, see vol. I, p. 435.

¹⁷ Citing, Constitution, 1777, Sections 3, 25.

¹⁸ Citing, Graham's Jurisprudence, p. 141, Paine and Duer's, Practice, vol. I, 141; New York Civil List (edition of 1867), p. 91.

¹⁹ Citing, Bradford's Laws (edition of 1694).

²⁰ Citing Note, Revised Laws, vol. I, 318 (1813).

²¹ Citing, New York Historical Collections, vol. III.

²² Citing, Albany Law Journal, vol. XIX, 350, and vol. XX, 170.

²³ Citing, Wyche's Practice, p. 1.

chronicle of the adjudications of the Supreme Court in the shape of Law Reports, and it is therefore apt to be assumed, and, indeed, is so stated, that its sphere of action was narrow and its administration imperfect. But it is susceptible of demonstration that this court was then quite equal to the more limited exigencies of the times. The chief-justices during this period, John Jay, Richard Morris, Robert Yates, and John Lansing, Jr., were all eminent as lawyers; and the associate-justices, with the exception of Hobart, who was a scholarly man, were all bred to the law. Of associate-justice Benson, who sat from 1794 to 1802, Chancellor Kent has said, that he did more to reform the practice of the court than any member of it did before or since.²⁴ Benson drew those rules of this court which were adopted April term, 1796; they are often termed the first rules of the court,²⁵ but this is an error. Wyche, in the first treatise on the practice of the New York Supreme Court,²⁶ refers to rules of court adopted as early as 1727, or seventy years previously, and the rules of 1791-3 are published in Coleman's Cases.²⁷ As a master of special pleading, Justice Benson was hardly surpassed by Chief-Justice Saunders himself.²⁸

It was, however, with Kent's elevation to the Supreme Court, in 1798, that its usefulness became more widely apparent through the medium of the reporters. Prior to this time law reporting in America had not ripened into a system; there were numerous pamphlets published, containing arguments of counsel and decisions of judges, but no systematic reports; and both the Colonial and State bars were compelled to have recourse to the English reports for illustrations and precedents. With the latter they were profoundly versed and thus the elements of the jurisprudence of the common law were firmly imbedded in American soil. The

²⁴ Citing, Thompson's, History of Long Island, vol. II, 187-189.

²⁵ Citing, New York Civil List, p. 93.

²⁶ New York, 1794.

²⁷ Citing, Page 31.

²⁸ Citing, Duer's, Discourse on Kent, p. 14.

formative period of the Supreme Court, during which it exercised its greatest influence on the particular jurisprudence of this State, was during the judgeships of Kent, Spencer and Thompson (1798-1823). Then it was that many principles were settled and that fluctuating theories gave place to fixed and determinate rules embraced in leading cases, reported in the famous series by the official reporters, Caines and Johnson.

The condition of the New York bar at the close of the eighteenth century offers a strange contrast to its present leading position. In a retrospect written in 1847 for the information of his family, Kent thus depicts it:²⁹

The progress of jurisprudence was nothing in this State (New York) prior to the year 1793. There were no decisions of any of the courts published. There were none that contained any investigation. In the city of New York, Hamilton, Harrison, Burr, Cozine, and perhaps John Lawrence and old Samuel Jones (then deemed and known as the oracle of the law) began to introduce the knowledge and cultivation of the law, which was confined of course to Coke, Littleton, and the reporters, down to Burrow. Hamilton brought a writ of right in a Waddell cause in this city (New York) which made quite a sensation and created much puzzle in the courts. The judges of the Supreme Court (Morris, Yates, and Hobart) were very illiterate as lawyers, and the addition of John Lansing in 1790, was supposed to be a great improvement to the bench, merely because he appeared to have studied more the King's Bench Practice, and was more diligent, exact, and formal in attending to cases and enforcing rules of practice. The country circuit Courts were chiefly occupied in plain ejectment suits and in trying criminals in the Courts of Oyer and Terminer. In short, our jurisprudence was a blank when Hamilton and Harrison first began by their forensic discus-

²⁹ Citing, *Memoirs and Letters*, pp. 58-59.

sions to introduce principles and to pour light and learning upon the science of law.

That Kent, modest as he undoubtedly was, estimated his services to the court at their full worth, appears from a letter written in 1828:⁸⁰

When I came to the Bench there were no reports or State precedents. The opinions from the Bench were delivered *ore tenus*. We had no law of our own, and nobody knew what it was. I first introduced a thorough examination of cases and written opinions. In January, 1799, the second case reported in first Johnson's cases, of Ludlow vs. Dale, is a sample of the earliest. The judges, when we met, all assumed that foreign sentences were only good *prima facie*. I presented and read my written opinion that they were conclusive, and they all gave up to me, and so I read it in court as it stands. This was the commencement of a new plan, and then was laid the first stone in the subsequently erected temple of our jurisprudence.

Between that time and 1804, I rode my share of circuits, attended all the terms, and was never absent, and was always ready in every case by the day. I read in that time Valin and Emerigon, and completely abridged the latter, and made copious digests of all the English law reports and treatises as they came out. I made much use of the *Corpus Juris*, and as the judges, Livingston excepted, knew nothing of French or civil law, I had immense advantage over them.

When he resigned the chief-justiceship in 1814, to accept the chancellorship of the state, the Supreme Court had been raised to a position of great dignity and influence, and commanded, as it deserved, the respect of state and nation alike.

But great as were Kent's services to the Common

⁸⁰ Citing, *Memoirs and Letters*, p. 117.

Law, they were as nothing compared to his services to Chancery, and it is not without reason that Story refers to Kent as the perfector, if not the father of American equity.³¹

Even in the State of New York, whose rank in jurisprudence has never been second to that of any State in the Union (if it has not been the first among its peers), equity was scarcely felt in the general administration of justice, until about the period of the Reports of Caines and of Johnson. And, perhaps, it is not too much to say, that it did not attain its full maturity and masculine vigor, until Mr. Chancellor Kent brought it to the fulness of his own extraordinary learning, unconquerable diligence, and brilliant talents.

When Kent assumed the Chancellorship in 1814, he brought to the task a mind trained and soaked, one might say, in the principles of the Common Law.

A study of English theory and practice, and a clear field enabled him to establish, if not to introduce, the system of equity upon firm and enduring foundations:³²

My practice was, first, to make myself perfectly and accurately (mathematically accurately) master of the facts. It was done by abridging the bill, and then the answers, and then the depositions, and by the time I had done this slow and tedious process, I was master of the cause and ready to decide it. I saw where justice lay, and the moral sense decided the court half the time; and I then sat down to search the authorities until I had examined my books. I might once in a while be embarrassed by

³¹ Citing, Story's, *Equity Jurisprudence* (13th Edition), Sec. 56, p. 53.

³² *Memoirs and Letters*, pp. 158-159.

a technical rule, but I most always found principles suited to my views of the case; my object was so to discuss a point as never to be teased with it again, and to anticipate an angry and vexatious appeal to a popular tribunal by disappointed counsel.

The equity he sought and found was not merely the equity of a well trained mind whose mainspring was a love of abstract justice applied to the concrete case. It was the Equity of English Chancery adapted to the wants and ways of the western world. Nor did he consider the discretion of the Chancellor to be the personal discretion of the individual judge.

In the leading case of *Manning vs. Manning*, decided in 1815,⁸³ he took occasion to examine the foundations of equity and formulated the doctrine of precedent as understood in a court of Chancery:

The Chancellor. The executors are called on to render an account of their trust; and they set up a claim to a commission of five per cent., as a compensation for their care and trouble in the management of the estate; and they, likewise, contend, that they ought not to account for interest on moneys belonging to the estate, and which they made use of for their private purposes.

1. The claim of an allowance has been pressed upon the Court with much zeal, as if the denial of it would be extremely unjust, and as if the Court was at liberty to deal with established rules just as it pleased. This very point was one that arose in the case of *Green vs. Winter*; and it was then considered as a settled rule in the English chancery, that no such allowance was admissible, unless it rested upon contract, or was given by the will. The rule there must be the rule here; for I take this occasion to observe, that I consider myself bound by those principles, which were known and established as law in the Courts of equity in

⁸³ Citing, *Johnson's Chancery Reports*, 527, 529, 532, 534.

England, at the time of the institution of this Court; and I shall certainly not presume to strike into any new path, with visionary schemes of innovation and improvement; *via antiqua via est tuta*. It would, no doubt, be, at times, very convenient, and, perhaps, a cover for ignorance, or indolence, or prejudice, to disregard all English decisions as of no authority, and to set up as a standard my own notions of right and wrong. But I can do no such thing. I am called to the severer and more humble duty of laborious examination and study. It was Lord Bacon who laid it down as the duty of a judge to draw his learning from books, and not from his own head. This court ought to be as much bound as a Court of law, by a course of decisions applicable to the case and establishing a rule. As early as the time of lord keeper Bridgman, it was held that precedents were of authority; and that it would be "very strange and very ill" to disturb a rule in chancery which had been settled.⁸⁴ The system of equity principles, which has grown up and become matured in England, and chiefly since Lord Nottingham was appointed to the custody of the great seal, is a scientific system, being the result of the reason and labors of learned men for a succession of ages. It contains the most enlarged and liberal views of justice, with a mixture of positive and technical rules, founded in public policy, and indispensable in every municipal code. It is the duty of this Court to apply the principles of this system to individual cases, as they may arise; and, by this means, endeavor to transplant and incorporate all that is applicable in that system into the body of our own judicial annals, by a series of decisions at home.

The master of the rolls, Sir Joseph Jekyll, disclaimed any discretionary power in the Court, sometimes ignorantly imputed to it, to follow the private affections, or any arbitrary notions of abstract justice, instead of the established maxims of law and equity. Though proceedings in equity are said to be *secundum discretionem boni viri*, yet when it is asked, *Vir bonus est quis?*

⁸⁴ Citing, Modern Reports, 307.

The answer is, *Qui consulta Patrum, qui Leges Juraque servat*,⁸⁵ and it may be laid down as a certain truth, that the English system of equity jurisprudence forms an important and very essential branch of that "common law," which was recognized in the constitution of this state. If it were not so, this Court would be a dangerous tribunal, with undefined discretion, and without either science or authority to guide it. The English decisions are, undoubtedly, the most authentic evidence of the English common law; and the dignity or independence of our Courts is no more affected by adopting these decisions, than in adopting the English language; or than the independence of France or Holland is wounded by following as they do, the civil code of the ancient Romans.

Our business, then, as questions arise, is to discover what rule, if any, has been established by the Courts in this state, and if none, then what was the existing rule in the English system of equity at the commencement of our revolution. And while engaged in this enquiry, we are not to blind our eyes against human knowledge, but it is incumbent on us to examine the several authorities, whether they be ancient or modern, whether they be before or since the revolution, whether they be foreign or domestic, which may tend in any degree to ascertain, explain, or illustrate, the point under consideration. When we have been able to deduce from them, with sufficient precision, the true, genuine rule of equity, that rule becomes the law of the case, and the case a precedent for the future.

With this explanation on the subject of cases, (and to which I have been led by the language of some decisions in this country,) I return to the point before me, and I think it is not to be denied that the law is settled against the claim of a trustee to compensation. The decisions have remained steady and uniform for a century and a half, and the rule applies not to executors merely, but equally to trustees of every description.

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⁸⁵ Citing, Sir J. Jekyll, in 2 Pere William's Reports, 753. See also 3 Pere William's Reports, 411.

It appears to be the practice in several of the United States, to allow a commission of so much per centum to executors and other trustees.³⁶ But this practice cannot be received here as authority, however respectable the source; for it is not founded upon any different construction of the English law, but upon local usages or statutes, which have confessedly changed the English rule. I am not responsible for the justice of that rule. I only declare the law as I find it to be settled; and if the rule was admitted to be, according to the language of one of the southern chancery cases, "a monstrous rule," I should not feel myself at liberty to say, as that case does, "so far as I can go, I shall blot it out forever." It is the province of the legislative, and not of the judicial power, to change the law; and our constitution has auspiciously declared, that the common law of England (in which I include, of course, the equity system) "shall continue the law of this state, subject to such alterations and provisions as the legislature of this state shall from time to time, make concerning the same."

The seven volumes of Johnson's Chancery Reports are classics of the profession and to them the reader must be referred who wishes to appreciate Kent's labors in detail. He will then be prepared to estimate the value of these services rendered by Kent to his state and nation. He will then be in a position to appreciate the accuracy and sobriety of Mr. Fowler's measured judgment of Kent as Chancellor:³⁷

Chancellor Kent's administration of the Court of Equity forms an epoch in the judicial history of New York. This remarkable

³⁶ Citing, Washburn's Reports, 246; 4 Hening and Mumford's Reports, 415; Mumford's Reports, 150; 3 Binney's Reports, 451.

³⁷ Albany Law Journal, vol. XXIII, 288.

man entered on his renowned career as chancellor the 25th of February, 1814; and in the same year Johnson, the Supreme Court reporter, was directed by the legislature to report the adjudications of the chancellor. All Kent's chancery decisions of interest are contained in the seven volumes of Johnson's Chancery Reports, the first regular equity reports in New York, or, indeed, in America. Notwithstanding Kent had for sixteen years prior to his accession to the Court of Chancery been a common law judge, he was nevertheless, at the outset, profoundly versed in the science of equity. Nor was he without practical experience in the chancery administration. As a master in chancery, he had perceived the great benefits to be derived from the application of the principles of equity to the every-day necessities of society, the complicated commercial accountings, the administration of estates, and the various auxiliary duties of the master's office. As a Supreme Court justice, sitting in the Court of Errors, he had for many years exhibited great interest in the chancery appeals. In *Le Guen vs. Kemble*,⁸⁸ Justice Kent had held that the Court of Errors, in analogy to the practice prevailing in the House of Lords appeals, might both reverse the adjudications in chancery and determine the proper decree to be made below. On this principle, all his investigations of the chancery appeals were original and profound. In addition to these qualifications for the chancery bench, Kent possessed others far more extensive. From the time he had been called to the bar, he had assiduously devoted himself not only to legal literature in its Anglo-American phase, but to the study of French and classical literature, with both of which, according to Justice Duer, he had even then but a slender acquaintance. In these excursions to a wider domain of knowledge he perfected himself in the system of public and Roman law in their varied phases, ancient and modern. With the utmost patience he made himself the peer of the jurisconsults and the master of English equity. In the Court of Chancery he had scope for all his varied attainments; and although he had for years been a dis-

⁸⁸ Reported in, 1 Johnson's Cases, p. 507.

tinguished common-law judge, he there first reached that height of distinction which few jurists have equalled, and, still fewer surpassed. The most casual reader of Johnson's *Chancery Reports* has doubtless observed that Chancellor Kent received his inspiration from the juridical writings of almost every nation in Europe, ancient and modern; the compilations of the Justinian era, the French jurists, Domat, D'Aguesseau, Fournel, Emerigon, Pothier, and Valin; the Swiss publicists, Burlamaqui and Vattel; the Dutch juridical writers, Grotius, Vinnius, Voet, and Bynkershœk; the German writers, Puffendorf, Heineccius, and Stryk. From these, and many like sources in addition to the English jurists, Chancellor Kent illustrated the true scope and province of equity tribunals. The effect of this was at once perceptible on the legal publications of that day; the law booksellers issued many translations of the writings of the French jurists, and they readily found places in those working libraries previously devoted to the English common-law reporters and the equity reports of Vernon, Vesey, and Cox. By some, Chancellor Kent's decisions have been thought to be too expository and elementary in character, and by others to follow too closely in the footsteps of Nottingham, Hardwicke, and Eldon. Were these criticisms true they would be directed at no common fault, but they are not even half-truths. Chancellor Kent found the ancient jurisprudence of the common law greatly modified by statutes of the New York Legislature, and by the new Constitutions of government. Hence it was his peculiar province to apply the principles of equity jurisprudence to these changes, and necessarily his opinions were somewhat detailed and written rather in the style of the commentator than in that of the judge. It is apparent that he intended to place the first series of American Equity Reports on foundations deeply and strongly laid; but that he was a servile imitator of the English jurists is erroneous. He freely admitted that he felt himself bound by the precedents in the English Chancery,³⁹ but he never failed to verify the original sources from which Lord Somers or

³⁹ Citing, *Manning vs. Manning*, 1 Johnson's *Chancery Reports*, p. 527.

Lord Hardwicke had drawn the principles of English equity. At least, he did not attribute to Bacon or Somers that which was due to Ulpian or Paulus. His was a most discriminating repetition, and he no more followed in the footsteps of the English chancellors than they followed in the footsteps of Vinnius or of Voet, or of the classical jurists. Yet that Chancellor Kent's was a great creative mind like that of Hugo Grotius, or supremely endowed like that of Somers, can never be maintained. Still, by common consent, he is placed, even by laymen, in the front rank of juridical writers.⁴⁰ Under Chancellor Kent the Court of Chancery of New York, founded in 1683, reached its height of usefulness and distinction.

It is distressing to note that the last years of Kent's Chancellorship were embittered by the frequency with which the Court of Errors, swayed as he thought by political considerations, overruled some of his most careful and elaborate opinions. In a letter written in 1820 to William Johnson, the Reporter, he said:

But, to tell you the truth, I am discouraged and heart-broken. The judges have prevailed on the Court of Errors to reverse all my best decisions. They have reversed *Frost vs. Beekman*, the *Methodist Church vs. Jacques*, *Anderson vs. Boyd*, and others. After such devastation, what courage ought I to have to study and write elaborate opinions? There are but two sides to every case, and I am so unfortunate as always to take the wrong side. I never felt more disgusted with the judges in all my life, and I expressed myself to Judge Platt in a way to mortify and offend him. According to my present feelings and sentiments, I will never consent to publish another opinion, and I have taken and removed out of sight and out of my office into another room my

⁴⁰ Citing, Buckle's, *History of Civilization*, p. 174.

three volumes of Chancery Reports. They were too fearful when standing before my eyes.

But reversed or unreversed, his opinions stand as a monument to his care and precision, learning and intelligence.⁴¹

"In 1823," wrote Chancellor Kent, "a solemn era in my life had arrived. I retired from the office at the age of sixty." Little did he think, nor could he well know, that he was about to enter upon a career of greater and more abiding influence and make terms with posterity.

During the twenty-five years of judicial life he resided in Albany. Removed, rather than released from office, he returned to take up again the care, and in his case the burden, of professional life. A book-lover must needs have a fortune and a large

⁴¹ A few of his Leading Opinions in Chancery are the following: Kane vs. Vanderburgh, 1 Johnson's Chancery Reports, 11; Herrick vs. Blair, 1 Johnson's Chancery Reports, 101; Nicoll vs. Trustees of Huntington, 1 Johnson's Chancery Reports, 166; Parkhurst vs. Van Cortlandt, 1 Johnson's Chancery Report, 273, Executors and Heirs of Wendell vs. Van Rensselaer, 1 Johnson's Chancery Reports, 344; Botsford vs. Burr, 2 Johnson's Chancery Reports, 405; Demarest vs. Wynkoop, 3 Johnson's Chancery Reports, 129; Shaver vs. Radley, 4 Johnson's Chancery Reports, 310; Hicks vs. Hotchkiss, 7 Johnson's Chancery Reports, 303; Jerome vs. Ross, 7 Johnson's Chancery Reports, 315.

The following cases at law may be cited as fair specimens: Cortel-you vs. Lansing, 2 Caines's Cases, 200; Smith vs. Cheatham, 3 Caines's Cases, 57; Ludlow vs. Browne, 1 Johnson's Reports, 16; Goix vs. Low, 1 Johnson's Reports, 341 (for which two cases see Hilton vs. Guyot, 159 United States Reports, 113); People vs. Olcot, 2 Johnson's Cases, 302; People vs. Croswell, 3 Johnson's Cases, 363; John Van Ness Yates vs. Lansing, 5 Johnson's Cases, 282; Fireman Insurance Co. vs. Walden, 12 Johnson's Reports, 514; Griswold vs. Waddington, 15 Johnson's Reports, 57, 16 Johnson's Reports, 438.

part of his salary found its way to his library. Whether he would or not, he must add to his savings. He therefore reopened his law office in New York and busied himself with an ample chamber practice. Once again the *responsa prudentum* came to honor in the world, and the Trustees of Columbia College appointed him to the chair of Law which had remained vacant since his resignation of it in 1797.

The Chamber practice of the retired Chancellor offers little of interest; not so the professorate. The door of the classroom opened upon immortality. It is therefore necessary to consider in some detail the law teacher.

On December 24th, 1793, Kent was elected Professor of Law in Columbia College and he devoted himself with great zeal and industry to the "compilation" of his law lectures. The next year he delivered his lectures for the first time. "I read a course in 1794-95 to about forty gentlemen of the first rank in the city. They were well received, but I have long since discovered them to have been slight and trashy productions." In this he was mistaken for they were neither slight nor trashy. Students are proverbially severe critics, but the students were satisfied and enthusiastic. In the language of a competent Judge John Duer, the lectures were "judicious, discriminating, and comprehensive." The introductory lecture, printed privately in 1794 and republished in the Columbia Law Review for

May, 1903, disproves the statement of the modest and deprecatory author.

The course of lectures closed on March 1st, 1795, and were, as previously stated, well received. In a letter to his brother, the Professor wrote:⁴²

On Friday last I closed my lectures at college and I feel now restored to my ancient freedom. Twenty-six lectures have been delivered, extending not only through the Constitution and Jurisprudence of the Union, the Constitution of this and the other States, but our doctrine of real property. My first plan was to examine law of personal property, including the commercial branches and the system of our criminal code. But I found myself absolutely unable to complete the whole, and was obliged to leave this first course imperfect. It will be an easy thing to make these additions, and review and improve the whole by next November. I am satisfied that my lectures have been well received, and that my expectations are answered. When I recollect what I have done in point of labor and researches for a year past, I am astonished at the extent of the effort, and I should not have had courage to undertake it had I fully anticipated the pains which have been bestowed.

But the newness of the thing wore off and the second course delivered in the succeeding year met with little encouragement. The third trial proved fatal to the Professor as no student offered himself as a target. The good man folded up his manuscript and penned on the fly-leaf of the printed law lectures, the following mortuary note:⁴³

This work was published in December, 1794, at the request of the trustees. I was appointed Professor of Law in Columbia

⁴² *Memoirs and Letters*, pp. 74-75.

⁴³ *Memoirs and Letters*, pp. 76-77.

College, Dec. 24, 1793. On the 17th of November, 1794, I commenced the reading of a course of Lectures in the College Hall and delivered the introductory lecture. I read that season twenty-six lectures (two a week) and was honored by the attendance throughout the course of seven students and thirty-six gentlemen, chiefly lawyers and law students who did not belong to the college. During my second course, commencing November, 1795, I read thirty-one lectures, in my office, and had only two students besides my clerks. The next season I attempted another course, but no students offering to attend, I dismissed the business, and, in May, 1797, sent a letter of resignation to the trustees. This was not accepted, and in the winter of 1797 and 1798, in my office, I read lectures to six or eight students, and in April, 1798, I finally resigned the office. I published the ensuing dissertations in December, 1795, and they form the first three of the thirty-one lectures I have composed.

Such success could not be termed dazzling and it was well for the little man that his practice picked up and that he was in the very year of his final resignation transferred from an empty classroom to a busy court.

The trials of a law teacher were not forgotten, and when a quarter of a century later he unrolled his manuscript he did so with no little foreboding. His frame of mind and his reliance on a higher power are somewhat quaintly exhibited in the following letter dated November 9th, 1824, to his brother:⁴⁴

I have commenced my lectures and they give me a good deal of trouble and anxiety. I am compelled to study and write all the time, as if I was under the whip and spur. But I take early

⁴⁴ *Memoirs and Letters*, p. 192.

and regular habitual exercise, and am very temperate, and on the whole am very healthy. I have no reason to complain, but on the contrary have the most persuasive motives of gratitude to God for his continuous goodness.

Whether the result was due in part to added knowledge of the law and skill in its exposition, or whether his health permitted the display of his full powers, or whether finally the divine aid to which he expressed gratitude comforted and sustained the rehabilitated professor, does not appear, but the success of the course was instant, assured and continuous. In 1826 he completed the entire course and he yielded to the not unnatural desire to print the lectures and thus give them to the student body of the country.

The work was to be completed in two volumes and the first went to the press in 1826. In the preface to the second volume issued the next year, the learned author stated that a third volume would be necessary to embrace commercial law and the doctrines of real estate. This third volume appeared in 1828, to which was added a fourth in 1830, which completed the *Commentaries on American Law*. The four editions of the work that appeared during his lifetime were much enlarged and revised to meet the needs of student and practitioner, for to both of these classes the work became an inspiration and a guide, as it issued from the press. In the course of seventy years, the work has run through fourteen editions and its day of usefulness has not

yet passed. Among the editors we find such men as Justice Holmes, and the late Judge Comstock.

The reasons for this continued and sustained popularity are not hard to find. A broad and comprehensive, yet scientific and detailed survey, of the substantive law of the courts, with the exception of Criminal Law, was given for the first time. This would have been of itself a boon to the profession, and the work would have taken its place among books of reference. New editions would have kept it alive as long as the author lived, but with his death the book doubtless would have followed him to the grave. That the work survived him and will survive for many a day was due to its accuracy and comprehensiveness; the symmetry of its parts; the philosophic and measured calm, combined with a profound learning and a charm of style that suggests while it distances the English model. Kent was from boyhood a lover of English, and he acquired by practice, as well as from native feeling, a style admirably adapted to the expression of his thought, at once sufficiently technical for the lawyer and attractive to the student and layman. If style is the man, as Buffon says, the happy union of man and style makes the classic.

In the Commentaries the breadth of conception,—for law with him is international as well as municipal, and the civil law is called in to aid to correct understanding,—the constant resort to history for an explanation of the present status of the law, are no

less noteworthy and remarkable than is the execution of the work as a whole. The first volume in its entirety may be considered as an introduction to the work, and with a mastery of this volume, general in its nature, the student is admirably equipped for a detailed and specific study of the body of the law. As is well known, the volume opens with a broad and comprehensive survey of the Law of Nations which Kent rightly considers as a part of the Common Law,⁴⁵ and therefore a part of our law. Inasmuch as "the faithful observance of this law is essential to national character, and to the happiness of mankind," to quote his own words, he prefaced the Commentaries on American Law by a careful outline of International Law. Years of reflection strengthened him in his view of the importance of this subject and while he ended his "Dissertations" of 1795 with a sketch of International Law, he gave the law of nations the most prominent place in the Commentaries of 1826.

As the "Dissertations" is a rare little pamphlet, not likely to fall under the eye of the reader, a paragraph as apt to-day as when written, may be quoted:⁴⁶

I have thus attempted for the benefit of the student, a sketch of the principal matters with which the Law of Nations is conversant. It is a code so full of wisdom, that perhaps those persons who may from time to time be called to administer the happy

⁴⁵ *Triquet vs. Bath*, 3 Burrow's Reports, 1478; *Heathfield vs. Chilton*, 4 Burrow's Reports, 2015.

⁴⁶ Page 81.

government of this country, cannot better demonstrate that they love mankind, and revere justice, than by yielding a punctual obedience to its laws.

This compact treatise of two hundred pages⁴⁷ was the first scientific treatment of the subject in the English language and its authority is great in England and the Continent as well as in America. Indeed it has been printed and published separately in England, and it may be said that this treatise and the judgments of Kent on questions of International Law, have placed him in the front rank of International publicists.

Part two of the first volume of the Commentaries is devoted to a consideration of the Government and Constitutional jurisprudence of the United States and many there are who consider this to be the best short account of the origin of the Union and its relations to the State Governments.

As the student is thus given an adequate outline of International and Municipal Law, Kent passes to a consideration of the various sources of the Municipal Law of the several states, including an interesting and adequate discussion of Statute Law, reports of judicial discussions, and the principal publication of the Common Law. The volume ends with an admirable presentation of the civil law, which Kent rightly considered as indispensable to the student of our system of jurisprudence.

The second volume treats of the law concerning

⁴⁷ In the first edition the treatise was fifteen pages shorter.

the rights of persons and of personal property, which latter subject occupies the greater portion of the third volume. Completing this important and technical subject, the learned author devotes the balance of the volume and the whole of the fourth to a careful and detailed presentation of the law of real property in its infinite variety and extent.

When we consider how little the ordinary lawyer knows of the English reports and how difficult it was to obtain this information in Kent's day, this Section must have been a veritable boon to the serious minded. It is still important and is written in a singularly interesting and attractive style. The closing paragraph of the Section shows Kent at his best, and may be quoted as a specimen of his grave and measured eloquence touched with kindly sympathy and human interest:⁴⁸

I have now finished a succinct detail of the principal reporters; and when the student has been thoroughly initiated in the elements of legal science, I would strongly recommend them to his notice. The old cases, prior to the year 1688, need only be occasionally consulted, and the leading decisions in them examined. Some of them, however, are to be deeply explored and studied, and particularly those cases and decisions which have spread their influence far and wide, and established principles which lie at the foundations of English jurisprudence. Such cases have stood the scrutiny of contemporary judges, and been illustrated by succeeding artists, and are destined to guide and control the most distant posterity. The reports of cases since the middle of the last century ought, in most instances, to be read in course, and they will

⁴⁸ Commentaries, vol. I, 486-497.

conduct the student over an immense field of forensic discussion. They contain that great body of the commercial law, and of the law of contracts, and of trusts, which governs at this day. They are worthy of being studied even by scholars of taste and general literature, as being authentic memorials of the business and manners of the age in which they were composed. Law reports are dramatic in their plan and structure. They abound in pathetic incident, and displays of deep feeling. They are faithful records of those "little competitions, factions, and debates of mankind" that fill up the principal drama of human life; and which are engendered by the love of power, the appetite for wealth, the allurements of pleasure, the delusions of self-interest, the melancholy perversion of talent, and the machinations of fraud. They give us the skillful debates at the bar, and the elaborate opinions on the bench, delivered with the authority of oracular wisdom. They become deeply interesting, because they contain true portraits of the talents and learning of the sages of the law. We should have known but very little of the great mind and varied accomplishments of Lord Mansfield, if we had not been possessed of the faithful reports of his decisions. It is there that his title to the character of "founder of the commercial law of England" is verified. A like value may be attributed to the reports of the decisions of Holt, Hardwicke, Willes, Wilmot, DeGrey, Camden, Thurlow, Buller, Kenyon, Sir William Scott, Grant, and many other illustrious names, which will be immortal as the English law. Nor is it to be overlooked as a matter of minor importance, that the judicial tribunals have been almost uniformly distinguished for their immaculate purity. Every person well acquainted with the contents of the English reports must have been struck with the unbending integrity and lofty morals with which the courts were inspired. I do not know where we could resort, among all the volumes of human composition, to find more constant, more tranquil, and more sublime manifestations of the intrepidity of conscious rectitude. If we were to go back to the iron times of the Tudors, and follow judicial history down from

the first page in Dyer to the last page of the last reporter, we should find the higher courts of civil judicature, generally, and with rare exceptions, presenting the image of the sanctity of a temple, where truth and justice seem to be enthroned, and to be personified in their decrees.

Comparisons are frequently drawn between Marshall and Kent, and stress is laid upon the fact that the former divined the judgment from the circumstances of the case, while the latter reached a conclusion based upon a careful and painstaking examination and study of the authorities.⁴⁹

This is true, but it does not follow that Kent would not have reached Marshall's conclusion had he trusted to the strength of his understanding. It is, however, the fact that the one preferred to fortify his reason while the other preferred reason unadorned. The difference, while temperamental, was, it would seem, likewise a difference in the quality of the mind. Marshall stood alone, either because he did not know the authorities or because the vigor and originality of his mind spurned reliance upon others. In this way Marshall and Shaw were strangely alike. Kent, on the other hand, knew the authorities and preferred to intrench himself behind them. In this respect, and in this respect alone, Kent and Story are veritable brothers in the law. Both types are useful, and the four must be taken as ideals of the bench.

In one respect, however, the comparison is not

⁴⁹ Compare Essay on Marshall, *supra*, p. 311.

wholly fair to Kent, because as Judge and Chancellor he dealt with problems covered by authority, and therefore susceptible of learned treatment. In questions of Constitutional Law, Marshall found few precedents and it is his glory that he has left many. If Kent's method of approach be considered, it will be seen that the methods of the two were alike in that Kent decided the case on the facts and then searched for the law. Marshall declared the law and precedent at one and the same time.

The curious reader who cares to pursue the subject further and test the powers of both applied to a concrete problem, will find ample material in the various cases arising out of the exclusive grant of the State of New York to Messrs. Fulton and Livingston to navigate the waters of the state. As a citizen of New York, with an inclination to maintain the just prerogative of the state, Kent decided in favor of the validity of the exclusive grants. Entrusted with the prerogatives of a nation, Marshall supported the power and dignity of the nation.⁶⁰ Both were without authority, and while they did not and could not, from the circumstances of the case, meet upon common ground, intellectual powers of the highest kind are displayed in their discussion and decision of underlying principles.

It is not perhaps beyond the mark to suggest that Kent was right on the question of principles involved, and that the superb reasoning of Mr. Justice

⁶⁰ Compare, *supra*, p. 367.

Curtis in *Cooley vs. the Port Wardens*,⁵¹ fully sustains the contentions of the learned Chancellor that the power in Congress to regulate does not divest the state until Congress has acted and thus preempted the field of legislation. As to the effect of the general license it may well be that the great Chief-Justice was right. That Kent was right on principle is the measured judgment of the late Professor Thayer.⁵²

As a further test of Kent's quality of mind as compared to Marshall's, resort may well be had to *Hicks vs. Hotchkiss*,⁵³ in which Kent took issue with Marshall's reasoning in *Sturges vs. Crowningshield*.⁵⁴ It is of interest to note that Kent's view prevailed in the leading case of *Ogden vs. Saunders*,⁵⁵ notwithstanding Marshall's dissent.

If Marshall's monument stands at the base of the Capitol, it is not without reason that the bronze statue of Kent is housed within the Library of Congress.

If we now turn from the domain of Constitutional Law in which Chief-Justice Marshall walks a lord

⁵¹ 12 Howard's Reports, 299 (1851).

⁵² Thayer's *Marshall*, pp. 88-89, 93-94. The cases are *Livingston vs. Van Ingen*, 9 Johnson's Reports, 507; *Ogden vs. Gibbons*, 4 Johnson's Chancery Reports, 150, in which Kent Chief-Justice and Chancellor delivered the opinion of the Court, and *Gibbons vs. Ogden*, 9 Wheaton's Reports, 1, in which Chief-Justice Marshall expounded the law and placed it upon its present broad and national basis.

⁵³ 7 Johnson's Chancery Reports, 303.

⁵⁴ 4 Wheaton's Reports, 122.

⁵⁵ 12 Wheaton's Reports, 213.

among men, and survey the other fields of law, the partisan of Kent may well court comparison. In the range and variety of the Common Law, the Chief-Justice was deficient in technical learning, although the breadth of his mind is always evident.⁵⁶ Years of profound study and meditation had made Kent a master of the intricacies and subtleties of the common law, and he unraveled a knotty problem as easily as a child unwinds a ball of string. Soundness of judgment marks both of the chief-justices, but the learning of Kent is no less marked than its absence in Marshall.⁵⁷

If the attention be fixed upon Chancery the verdict must be the same, for Kent is the admitted master in Equity. English schoolmen may discuss the various merits of Nottingham, Hardwicke, and Eldon, and award the palm to the one or the other, or resort to nice distinctions and qualifications. But the mere mention of American Equity suggests Kent, at once the founder and expounder of Chancery in the United States. That he is without a rival in this peculiar domain is but faint praise, for he is without competitor. The seven volumes of Johnson's Chancery Reports do not admit of comparison.⁵⁸ Chief-Justice Marshall has not a few

⁵⁶ Thayer's *Marshall*, p. 56.

⁵⁷ A Single example of this is presented by the case of the *People vs. Croswell*, 3 Johnson's Reports, Appendix, 363, referred to in the *Life of Alexander Hamilton*.

For the *Life of Alexander Hamilton* by Mr. Scott, see vol. I. p. 357.

⁵⁸ See Duer's, *Discourse on Kent*, pp. 53-66, for an appreciation of Kent's services in Equity.

equity decisions to his credit, but in this field he is outclassed by Kent. Indeed, well informed persons there are, such as the editor of this series, who would not base Marshall's claim to distinction upon his services to equity.

And finally, if International Law be considered, the scales incline to the side of Kent. The present writer has read in detail the various judgments of both in the field of international law, and has little hesitancy in awarding to him the primacy. It is his personal opinion that Marshall is equally, perhaps more admirable in International than in Constitutional Law, for in this subject the questions of statesmanship and public policy play a greater because an International rôle, than in the restricted though not less subtle field of Constitutional Law. Marshall was not without guidance in matters of International Law, and his judgments are based upon precedent as well as theory.

Yet Kent stands the severest test, and the wealth of carefully digested authority makes each case a treatise in itself. Judge Duer's comment on the case of *Griswold vs. Waddington*,⁵⁹ is in point and deserves quotation:⁶⁰

It contains a more elaborate and thorough investigation into the consequences of a war, as affecting the relations, intercourse and contracts of the respective subjects of the hostile states, than is to be found in any other adjudged case, or in any treatise on the

⁵⁹ 15 Johnson's Reports, 57; 16 Johnson's Reports, 438.

⁶⁰ Duer's, Discourse on Kent, pp. 50-51.

subject, in our own, or in any foreign language. It is not merely a judicial opinion, but a most learned and exhaustive dissertation on this branch of national and municipal law, embracing a masterly and critical analysis of all the cases, and supporting every position by an irresistible force of argument and weight of authority. Like the famous treatise of Bynkershœck on Public Law, it ought not to be transiently consulted; but by a diligent and repeated perusal, should be transfused into the mind of the student.

Add to this the masterly treatment of the law of nations in the Commentaries, and it is at once evident that an equality of mind strengthened and refined by authority and precedent, gives the student the advantage, Constitutional law excepted, over the profound thinker whom posterity knows as the Great Chief-Justice.

If now we remember that Kent shone with a strong, if not an equal, light in these four fields of judicial activity, and that he is scarcely inferior in any one to the specialist, it necessarily follows that his versatility gives him an added claim to reverent admiration. The rare poise and balance is not less marked than the solidity and breadth of attainment.

If to this rounded, universal, and almost perfect equipment we add the ever present and continuous claim of expounder of our law, the conclusion seems well-nigh inevitable that Kent rightly assumes his place as the first figure in American Jurisprudence.

